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IN THE

Supreme Court of the United States

NEWSPAPER ASSOCIATION OF AMERICA,
BELO CORP., GANNETT CO., INC., and
MORRIS COMMUNICATIONS COMPANY, LLC,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals' decision, which prevents the Federal Communications Commission from implementing less restrictive "cross-media limits" and leaves in place indefinitely an absolute prohibition on common ownership of daily newspapers and broadcast radio or television stations in the same market, violates the deregulatory requirements of Section 202(h) of the Telecommunications Act of 1996, governing principles of administrative law, and appropriate constitutional principles governing regulation of these media.

LIST OF PARTIES TO THE PROCEEDING

In the consolidated proceedings below, petitioners the Newspaper Association of America ("NAA"), Belo Corp. ("Belo"), Gannett Co., Inc. ("Gannett"), and Morris Communications Company, LLC ("Morris") were intervenors in support of the Federal Communications Commission and the United States. Also intervening in the proceedings below were Nassau Broadcasting Holdings, Inc.; Nassau Broadcasting II, L.L.C.; Univision Communications Inc.; Capitol Broadcasting Company, Inc.; Consumers Union and Consumer Federation of America; Office of Communication of the United Church of Christ, Inc.; Millcreek Broadcasting, L.L.C.; Simmons Media Group; National Association of Black Broadcasters, Inc.; Rainbow/PUSH Coalition, Inc.; Family Stations, Inc.; Sunbelt Communications Company; Press Communications; and Diversified Communications.

The petitioners below were Prometheus Radio Project; Media General, Inc.; National Association of Broadcasters; Network Affiliated Stations Alliance; ABC Television Affiliates Association; CBS Television Affiliates Association; NBC Television Affiliates; Fox Entertainment Group, Inc.; Fox Television Stations, Inc.; Viacom Inc.; National Broadcasting Company, Inc.; Telemundo Communications Group, Inc.; Sinclair Broadcast Group, Inc.; Media Alliance; Paxson Communications Corporation; National Council of the Churches of Christ in the United States; Tribune Company; Emmis Communications Corporation; Center for Digital Democracy; Fairness & Accuracy in Reporting; Clear Channel Communications, Inc.; American Hispanic Owned Radio Association; Civil Rights Forum on Communications Policy; League of United Latin American Citizens; Minority Business Enterprise Legal Defense and Education Fund; Minority Media and Telecommunications Council; National Asian American Telecommunications Association; National Association of Latino Independent Producers; National

Coalition of Hispanic Organizations; National Council of La Raza; National Hispanic Media Coalition; National Indian Telecommunications Institute; National Urban League; Native American Public Telecommunications, Inc.; PRLDEF—Institute for Puerto Rican Policy; UNITY: Journalists of Color, Inc.; and Women's Institute for Freedom of the Press.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, NAA, Belo, Gannett, and Morris hereby submit a joint Corporate Disclosure Statement:

NAA is a non-profit organization representing the newspaper industry and over 2,000 newspapers in the United States and Canada. No publicly owned corporation has a financial interest in NAA, and NAA is not affiliated with any publicly owned corporation.

Belo and its subsidiaries own and operate a diversified group of market-leading broadcasting, publishing, cable, programming, and interactive media assets. Belo owns 19 television stations reaching approximately 14 percent of U.S. television households, publishes four daily newspapers, owns or operates a number of regional cable news channels, and provides a wide range of Internet-based services and products. Belo has no parent company. No publicly owned company owns more than 10 percent of its stock.

Gannett is a large diversified news and information company. Gannett owns 22 television stations reaching approximately 18 percent of U.S. television households, publishes 100 daily newspapers, including USA TODAY, owns a variety of non-daily publications, and has more than 100 web sites in the U.S. In addition, Gannett owns

Newsquest plc, the second largest newspaper publisher in the United Kingdom, and Gannett's wholly owned subsidiaries are involved, among other things, in offset printing, advertising, telemarketing, and media technology. Gannett has no parent company. No publicly held company owns more than 10 percent of its stock.

Morris is a privately held media company with diversified holdings including newspaper publishing and radio broadcasting. Morris is wholly owned by its sole member, Morris Communications Holding Company, LLC ("Morris Holding"), which, in turn, is wholly owned by its sole member, Shivers Trading & Operating Company ("Shivers"). Neither Morris, Morris Holding, nor Shivers is publicly owned. No publicly owned company owns more than 10 percent of the stock of Morris, Morris Holding, or Shivers.

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The Newspaper Association of America, Belo Corp., Gannett Co., Inc., and Morris Communications Company, LLC respectfully petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

This case involves a Third Circuit decision overturning a congressionally mandated effort by the Federal Communications Commission ("FCC" or "Commission") to modify a thirty year-old ban on the cross-ownership of a daily newspaper and a television or radio station in the same local market. The revised rules, which would have retained limits on cross-ownership in all but the nation's largest media markets, would provide limited, but much needed, regulatory relief and certainty to the affected industries. In particular, the new rules would better equip both newspapers and broadcasters—two of the nation's most significant outlets for local news—to remain competitive in today's increasingly multimedia environment. Because retention of the flat ban on cross-ownership needlessly precludes these local media from delivering more and higher quality news and information to the American public, the regulations at stake are of profound national importance.

Section 202(h) of the Telecommunications Act of 1996 obligates the FCC to review each of its broadcast ownership regulations periodically and to "repeal or modify" those that are no longer "necessary in the public interest." The Third Circuit decision nullified the clear deregulatory intent of this statutory provision, ordering the FCC to keep the flat ban in place indefinitely despite the Court's agreement with the agency that the ban no longer can be justified. In straying so far from both the language and the purpose of Section 202(h), the Third Circuit has created a direct conflict with the D.C. Circuit, which consistently has recognized the provision's deregulatory directive.

The Third Circuit also disregarded the high level of deference due to agency line-drawing determinations, particularly those involving elusive concepts such as media

diversity. Although paying lip service to *Chevron*, the Court faulted every deregulatory line-drawing decision in the FCC's decision and blatantly substituted its own judgment for that of the agency. In so doing, the Third Circuit has derailed the entire periodic review process mandated by Congress. Indeed, by demanding that the agency devise rules that fit a precise mathematical formula, the Court also has jeopardized the FCC's ability to craft *any* ownership rules of general applicability.

Finally, the Third Circuit opinion rests upon this Court's decision in *Red Lion*, issued more three decades ago. That case held that broadcasters are entitled to a lower level of First Amendment protection than any other media. Given the dramatic transformation in the information marketplace and regulatory environment that has occurred since the so-called "scarcity" rationale was first articulated, the time is now ripe for this doctrine to be reconsidered.

For all these reasons, the Court should grant this Petition.

OPINION AND ORDER BELOW

The opinion of the Court of Appeals (1a–190a) is reported at 373 F.3d 372. The FCC's order (206a–723a) is reported at 18 FCC Rcd 13620.[1]

JURISDICTION

The Court of Appeals entered its judgment on June 24, 2004. The Court issued a decision on a petition for rehearing filed by the FCC on September 3, 2004. On November 23, 2004, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 3, 2005. On December 22, Justice Souter further extended the time within which to file such a petition to and including January 31, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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1. Appendix citations are to the Petition for a Writ of Certiorari filed by Media General, Inc.

STATUTORY PROVISIONS AND REGULATIONS

This case involves Section 202(h) of the Telecommunications Act of 1996. § 202(h), Pub. L. No. 104-104, 110 Stat. 56 (1996). This case also involves Section 73.3555 of the FCC's regulations. 47 C.F.R. § 73.3555.[2] Also at issue is the First Amendment to the United States Constitution. U.S. CONST. amend I.

STATEMENT

A. Legal and Factual Background

Adopted by the FCC in 1975, the newspaper/broadcast cross-ownership ban is an absolute prohibition on the common ownership of a full-service television or radio broadcast station and a daily newspaper in the same local market. *See* 47 C.F.R. § 73.3555(c). Unlike the FCC's other broadcast ownership regulations, the ban has remained in place and has been inflexibly enforced for nearly three decades.

1. The FCC's Statutory Duty To Reconsider And Justify Anew The Cross-Ownership Ban

As part of the deregulatory mandate of the Telecommunications Act of 1996 (the "1996 Act"), Congress required the agency to review its existing broadcast ownership restrictions, including the newspaper/broadcast ban, every two years beginning in 1998.[3] Specifically, Section 202(h) of the 1996 Act calls for the FCC to determine whether any of its broadcast ownership regulations remain "necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." § 202(h), 1996 Act.

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2. For the convenience of the Court, Section 202 of the 1996 Act and Section 73.3555 of the FCC's rules are attached in a supplemental appendix to this petition.

3. In January 2004, Congress amended Section 202(h) to require reviews only every four years. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 100 (2004).

In March 1998, the FCC initiated the first biennial review proceeding pursuant to Section 202(h). In its *1998 Biennial Review Report*, issued in June 2000, the Commission made few substantive changes to its broadcast ownership regulations. *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, 15 FCC Rcd 11058 (2000). Recognizing, however, that "there may be certain circumstances in which the [newspaper/broadcast] rule may not be necessary to achieve the rule's public interest [objectives]," the FCC committed to "initiate a rulemaking proceeding to consider tailoring the rule accordingly." *Id.* at 11102. Well over a year later, the Commission issued the long-awaited notice of proposed rulemaking. *Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001). In late 2001 and early 2002, extensive comments were filed by a wide array of industry participants and advocacy groups. In particular, a number of owners of newspaper/broadcast combinations that were "grandfathered" by the FCC when the ban initially was adopted filed comments detailing their experiences in serving local audiences and demonstrating the extensive public interest benefits that can stem from cross-ownership.

2. The *Fox* and *Sinclair* Decisions

During the pendency of its 2001 rulemaking, the FCC suffered judicial reversals of several of its recent media ownership decisions. In *Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), the D.C. Circuit remanded the agency's decision to retain in the 1998 biennial review its 35 percent national television station ownership ("NTSO") cap and vacated the FCC's restriction on television/cable cross-ownership.[4] Shortly thereafter, in *Sinclair Broadcast Group*

4. The NTSO rule limits the percentage of U.S. households that a single owner can reach through commonly owned television (Cont'd)

v. FCC, 284 F.3d 148 (D.C. Cir. 2002), the Court remanded certain aspects of a 1999 Commission decision to modify its local television ownership rule.[5]

The D.C. Circuit found that the agency had "adduced not a single valid reason" to believe that the NTSO restriction was "necessary in the public interest." *Fox*, 280 F.3d at 1043. The Court described the Commission's efforts to analyze the state of competition in the television industry as "woefully inadequate." *Id.* at 1044. It further noted that the FCC had not attempted to link the facts on the record to its decision to retain the NTSO rule, which "is precisely what §202(h) requires." *Id.*

Fox criticized the FCC's decision to retain the television/cable cross-ownership restriction even more harshly. According to the D.C. Circuit, "[u]nder §202(h) the Commission may retain a rule only if it reasonably determines that the rule is 'necessary in the public interest.'" *Id.* at 1048. The Court stressed the agency's failure to consider relevant marketplace conditions and to harmonize prior inconsistent findings. *Id.* at 1050-52. Concluding that the Commission's reasons for retention of the ban "were at best flimsy" and that the rule was a "hopeless cause," the Court vacated the restriction. *Id.* at 1053.

In *Sinclair*, the D.C. Circuit focused on the FCC's failure to explain the inconsistencies between the way in which it accounted for the variety of local media "voices" under the

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(Cont'd)
stations. 47 C.F.R. § 73.3555(d). The former cable/TV cross-ownership rule restricted a party from owning a television station and a cable system in the same community.

5. The 1999 local television ownership rule allows co-ownership of two TV stations if (1) at least eight independently owned television stations, or "voices," remain in the market and (2) at least one of the co-owned stations is not among the four highest ranked in the market. *See Review of the Comm'n's Regulations Governing Television Broad.*, 14 FCC Rcd 12903 (1999).

local television ownership rule and the separate television/radio cross-ownership rule. *Sinclair*, 284 F.3d at 164. Because it found that the FCC had failed justify the "exclusion of non-broadcast media from the eight voices [component of the rule]," the Court remanded the proceeding to the FCC. *Id.* at 162.

In *Fox*, the D.C. Circuit interpreted Congress' deregulatory instructions in Section 202(h) and found that the FCC had applied "too low a standard" in carrying out its biennial review obligations. *Fox*, 280 F.3d at 1050. The Court stated that the statutory mandate requires the Commission to affirmatively show that its ownership rules are not merely "consonant with the public interest," but are required or needed to serve the public interest. *Id.* The Court further clarified that Section 202(h) has a substantial deregulatory purpose, noting that the provision "carries with it a presumption in favor of repealing or modifying the ownership rules." *Id.* at 1048; *see also Sinclair*, 284 F.3d at 152.

In response to a petition for rehearing filed by the FCC in *Fox*, the D.C. Circuit subsequently agreed that the meaning of "necessary in the public interest" in Section 202(h) was not yet ripe for review. *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537 (D.C. Cir. 2002). Accordingly, the Court decided to excise the language that had resolved this definitional issue from its original opinion. *Id.* Instead, it left this issue open for resolution in later proceedings. *Id.* at 540. Importantly, the Court did not modify its conclusion that Section 202(h) embodies a "presumption" in favor of deregulation.

B. The Proceedings Below

1. The FCC's 2002 Biennial Review

Shortly after the issuance of *Fox* and *Sinclair*, the FCC launched its 2002 biennial review rulemaking. Although the 2001 newspaper/broadcast cross-ownership proceeding was ripe for decision, the FCC decided to seek additional

comment on the ban, combining its consideration of the cross-ownership rule with the rules remanded in *Fox* and *Sinclair* and certain other media ownership limits.

In the 2002 proceeding, the FCC endeavored to respond to the criticisms of the D.C. Circuit and to respond to its obligations under Section 202(h). The agency commissioned twelve empirical studies examining the current state of the media marketplace (the "Media Ownership Working Group" or "MOWG" studies), which were released for public comment in October 2002. As FCC Chairman Michael K. Powell explained, the studies "represent[ed] an unprecedented data gathering effort to better understand market and consumer issues" and were issued in an effort to heed the Court's warning that the agency must have a "solid factual base to support its media ownership rules." *See FCC Releases Twelve Studies on Current Media Marketplace*, Public Notice, at 1, 2002 FCC LEXIS 4932, at *2 (Oct. 1, 2002).

In June 2003, the FCC adopted its *2002 Biennial Review Report and Order*, 18 FCC Rcd 13620 (2003), at 206a-723a ("*2003 Order*"). Spanning 20 months and comprising a public record including more than 520,000 public comments, the proceeding "represent[ed] the most comprehensive review of media ownership regulation in the agency's history. . . ." *FCC Sets Limits on Media Concentration*, Public Notice, 2003 FCC LEXIS 3121, at *1 (June 2, 2003). Relying on the D.C. Circuit's statements in *Fox* and *Sinclair*, the FCC acknowledged in the *Order* that the deregulatory presumption embodied in Section 202(h) "upend[s] the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *2003 Order* at 215a.

One of the most significant aspects of the *2003 Order* was the decision to repeal the absolute ban on newspaper/broadcast cross-ownership as well as the television/radio cross-ownership regulations and replace them with a series

of calibrated "cross-media limits." Under the revised rules, the FCC would have continued to prohibit cross-ownership in the nation's smallest media markets, or those with three or fewer television stations. *Id.* at 521a. In markets with between four and eight TV stations, parties would have been permitted to own:

- One or more daily newspapers, one TV station, and up to 50 percent of the radio stations permissible under the agency's separate local radio ownership limits;[6] or
- One or more daily newspapers and as many radio stations as could be owned under the local radio limits (but no TV stations); or
- Two TV stations (if otherwise permissible) and as many radio stations as would be permissible under the radio limits (but no daily newspapers). *Id.* at 530a-31a.

In markets with nine or more TV stations, the FCC decided to eliminate restrictions on cross-ownership. In reaching this decision, the FCC emphasized "the large number of outlets and owners that typify these markets and the operation of [the] intra-service television and radio caps," which would further ensure "that large markets continue to be served by a large number of different local media owners." *Id.* at 534a, 537a.

In eliminating its absolute ban on cross-ownership, the Commission relied on extensive empirical and real-world evidence to determine that doing away with the outright ban would serve its traditional public interest goals of promoting competition, localism, and diversity. First, based on the findings of one of the MOWG studies as well as information provided by individual commenters, the FCC determined that

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6. Under the local radio ownership rules, a party may own a varying number of radio stations depending on the total number of stations within the same Arbitron Metro Market. *See* 47 C.F.R. § 73.3555(a).

most advertisers simply "do not view newspapers, television stations, and radio stations as close substitutes." *Id.* at 433a. Accordingly, elimination of the ban would "not adversely affect competition in any product market." *Id.* at 434a.

The FCC next determined that restrictions on newspaper/broadcast cross-ownership were "not necessary to promote broadcasters' provision of local news and information" and, more notably, that the existing ban "actually works to inhibit such programming." *Id.* at 441a-42a. This conclusion was based in part on the compelling evidence provided by individual operators of existing newspaper/broadcast combinations. Nearly forty combinations that were grandfathered when the FCC adopted the ban are still in existence, as well as several created pursuant to waivers or recent newspaper acquisitions that do not yet fall under the restriction.[7] As the Commission observed, these individual case studies convincingly "illustrate how combining a newspaper's local news-gathering resources with a broadcast platform contributes to, rather than detracts from, the production of local news programming that serves the community." *Id.* at 445a. This was not at all surprising, as "[t]hese results flow from the particular journalistic experience associated with local daily newspapers, as well as the tangible economic efficiencies ... which can be realized through ownership of two media outlets." *Id.*

This real world evidence was resoundingly confirmed by the findings of one of the MOWG studies. Assessing the local news operations at a wide range of broadcast television network affiliates, the Study concluded that "[a]ffiliates co-owned with newspapers experience noticeably greater success under our measures of quality and quantity of local news

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7. Combinations created through newspaper acquisitions do not come under the restriction until the co-owned station's license comes up for renewal on the eight-year schedule established by Congress and the FCC. *Multiple Ownership of Standard, FM and Television Broad. Stations*, 50 F.C.C.2d 1046, 1076 (1975); 47 C.F.R. 73.1020.

programming than other network affiliates." MOWG Study #7, Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs*, released in MB Docket No. 02-277 (Sept. 2002), *available at http://hraunfoss.fcc.gov/edocs_public/attachment/DOC-226838A12.pdf*. More specifically, the Study revealed that newspaper-owned affiliates provided an average of *50 percent more* weekly hours of local news and public affairs programming than other stations and greatly outperformed other stations in news ratings and industry awards. *Id.*

In addition, the FCC found that "a blanket prohibition on the common ownership of broadcast stations and daily newspapers . . . can no longer be justified as necessary to achieve and protect diversity." *2003 Order* at 453a. Again, the agency cited evidence demonstrating that cross-ownership "creates efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public." *Id.*[8]

In determining that greater levels of cross-ownership would not pose an appreciable threat to local diversity, the FCC also emphasized that the "average American has a far richer and more varied range of media voices from which to choose today than at any time in history." *Id.* at 463a. Included

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8. Based on one of the MOWG studies, again supported by evidence from commenters, the FCC also determined that "commonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice." *2003 Order* at 457a (*citing* MOWG Study #2, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations*, released in MB Docket No. 02-277 (Sept. 2002)). The Study found that in half of the combinations studied, the "overall slant of the coverage of a company's television station was noticeably different from the overall slant of the coverage provided by the same company's newspaper in the same market," thus suggesting that common ownership does not lead to a "predictable pattern of news coverage and commentary. . . ." *Id.* at 457a-58a (internal citation omitted).

in the agency's decision was a 21-page assessment of the current media landscape and the changes that had taken place since the broadcast ownership rules were implemented in the 1960s and 1970s. *See id.* at 255a-288a. Based on this extensive analysis, the Commission unequivocally found that "[t]oday's media marketplace is characterized by abundance." *Id.* at 255a. In particular, it observed that "[t]raditional modes of media . . . have greatly evolved since the Commission first adopted media ownership rules . . . and new modes of media have transformed the landscape, providing more choice, greater flexibility, and more [audience] control" than ever before." *Id.* at 255a-56a. Against this rich and diverse backdrop, the FCC found, "the influence of any single [voice] is sharply attenuated," and "there will be a plethora of voices in most or all markets absent the [newspaper/broadcast cross-ownership] rule." *Id.* at 463a-64a.

Despite its unequivocal conclusion that a blanket ban on cross-ownership was not necessary to serve its public interest objectives, the agency opted to proceed cautiously, crafting new cross-media limits intended to ensure that local diversity would continue to be adequately protected. In the course of its deliberations, the agency developed the so-called Diversity Index. Modeled after the Herfindahl-Hirschmann Index typically used to assess economic concentration, the Diversity Index was intended to serve as a "tool" that would "help [the FCC] analyze outlets that contribute to viewpoint diversity in local markets." *Id.* at 479a-80a.

Based on information provided in a consumer survey conducted by Nielsen Media Research, the Index assigned shares to different media according to the popularity of each outlet type as a source of local news and information. The specific shares assigned were: 33.8 percent for television, 28.8 percent for newspapers, 24.9 percent for radio, and 12.5 percent for the Internet. *Id.* at 498a; *see also id.* at 486a-499a. The FCC expressly acknowledged that, because the Index did not incorporate data on any other sources of news

and information, including cable television and magazines, it understated the levels of diversity available in the vast majority of local markets. *Id.* at 480a-81a. Once the Commission had apportioned shares among the various media based on actual usage, it attributed equal weights to each outlet in the same media category. *See id.* at 499a-505a.[9] The agency chose this option to focus on the "availability of outlets as a measure of potential voices," rather than strictly on current usage levels, which could be expected to fluctuate over time. *Id.* at 499a.

The FCC explained in its decision that the Diversity Index was meant to serve only as a "methodological tool" to provide its decision with a measure of "empirical footing" and was employed to "inform[]," but not to "replace [the agency's] judgment in establishing rules of general applicability that determine where it should draw lines. . . ." *Id.* at 479a-80a, 508a. Instead, the cross-media limits were "based on a set of assumptions drawn directly from the record evidence in [the] proceeding and premises that are consistent with past Commission policy and practice." *Id.* at 509a. This must be the case, the FCC observed, because the concept of "diversity is inherently subjective and cannot be reduced to scientific formula." *Id.* Moreover, the Diversity Index is necessarily "a blunt tool," useful "only in the aggregate" that will not be applied to measure diversity in specific markets. *Id.* at 484a.

2. The Third Circuit Decision

A number of parties filed petitions for review of the *2003 Order*. While the industry parties filed petitions in the D.C. Circuit, which had previously heard all of the media ownership appeals, several consumer advocacy groups chose to file their petitions in various Courts of Appeals, including

9. For example, given the overall 34 percent share assigned to television, each station in a market with ten TV outlets would be assigned a 3.4 percent share.

the Second Circuit, the Third Circuit, and the Ninth Circuit. The Judicial Panel on Multidistrict Litigation, acting pursuant 28 U.S.C. § 2112(a), ordered the petitions consolidated in the Third Circuit. On September 3, 2003, that Court granted a motion to stay the effective date of FCC's revised rules and ordered the agency to keep its prior ownership rules in place pending the outcome of judicial review. *See* Order, Nos. 03-3388, *et al.* (Sept. 3, 2003), at 194a-96a.

Despite the fact that the FCC's decision was a direct outgrowth of the D.C. Circuit's decisions in *Fox* and *Sinclair* and over the dissent of Chief Judge Scirica, the Third Circuit also denied requests to transfer the case back to the D.C. Circuit. *See* Order, Nos. 03-3388, *et al.* (Sept. 15, 2003), at 197a-205a.

On June 24, 2004, the Third Circuit issued an opinion—once again, over the dissent of Chief Judge Scirica—in which it reversed and remanded virtually every aspect of the *2003 Order* that was deregulatory in nature, including the decision to replace the newspaper/broadcast ban with the cross-media limits. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), at 1a-190a. The Third Circuit further ruled that it—specifically, the same three-judge panel—would retain continuing jurisdiction over the agency's action on remand.[10] The Court also extended the stay on the implementation of the revised media ownership rules pending its review of the remand decision. *Id.* at 107a.

Although it remanded the modified cross-ownership rules, the Court agreed with the key rationales underlying the FCC's decision and specifically found that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no

10. Because recusals had left the Court with an insufficient number of judges to vote on a petition for rehearing, the Court ordered that petitions for rehearing *en banc* would not be accepted for filing; only petitions for panel rehearing would be accepted. *See* Partial Judgment, Nos. 03-3388, *et al.* (June 24, 2004).

longer in the public interest." *Id.* at 40a. Specifically, the Court affirmed the FCC's determinations that:

- The blanket ban is not necessary to promote competition in local markets because newspapers and broadcast stations are not viewed as close substitutes;
- The ban undermines the FCC's localism objective by preventing combinations that would allow for the production of more and higher quality news;
- There is insufficient evidence that ownership influences viewpoint to warrant a blanket cross-ownership ban, thus making it unjustifiable on diversity grounds. *Id.*

Despite these findings, the Court stayed the repeal of the absolute ban and sent the modified cross-media limits back to the FCC because of perceived flaws in the Diversity Index. Dismissing arguments by the FCC and other parties that the Index served as no more than an analytical tool that was not central to the agency's decision, the Court found that the agency failed to "identify any consideration other than the Diversity Index as having influenced the formulation of the Cross-Media Limits." *Id.* at 58a. The Court also disregarded arguments that the Index was not intended to be a precise representation of the level of diversity in any particular market. Instead, the Court concluded that the Commission: (1) "gave too much weight to the Internet as a media outlet" in the Index; (2) "irrationally assigned outlets of the same media type equal market shares;" and (3) "inconsistently derived the Cross-Media Limits from its Diversity Index results." *Id.* at 49a, 63a.

Further, in interpreting the biennial review mandate of Section 202(h), the Court determined that the requirement for the agency to repeal or modify any rules that are "no longer [necessary] in the public interest" embodies no more than a "'plain public interest standard.'" *Id.* at 32a-33a. Thus, the FCC may retain a rule so long as it demonstrates that the restriction remains "convenient" or "useful" and does not

need to show that the rule is "indispensable" to the public interest. *Id.* at 33a. Although acknowledging that Section 202(h) was "enacted in the context of deregulatory amendments" and is in fact a "deregulatory" provision, the Third Circuit nonetheless concluded that the provision does not operate as a "one-way ratchet" and that the agency actually may fulfill its biennial review mandate by adopting more stringent regulations. *Id.* at 34a. In support of this finding, the Court concluded that Section 202(h) is only "deregulatory" in the sense that it "requires the Commission periodically to justify its existing regulations, an obligation it would not otherwise have." *Id.* at 34a.

Finally, the Third Circuit determined that continued regulation of cross-media ownership does not violate the First or Fifth Amendments. *Id.* at 46a-48a. In so doing, the Court concluded that it was bound by *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969), in which the Supreme Court held that broadcasters were entitled to a diminished level of First Amendment protection because of the "scarcity" of broadcast spectrum. The Court of Appeals further concluded that it was constrained by *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"). In that case, the Supreme Court ruled that, under the rational basis standard of review applied to the regulation of broadcasters pursuant to *Red Lion*, the newspaper/broadcast ban was not unconstitutional. *Prometheus* at 47a.

3. Chief Judge Scirica's Dissent

In a strongly worded and lengthy dissent, Chief Judge Scirica disagreed with the Court's decision to stay and remand the revised media ownership rules. In general, he found that the Court had "supplant[ed] the well-known principles of deference accorded to agency decision-making" and "substituted its own policy judgment for that of" the FCC. *Id.* at 107a-08a (Scirica, C.J., dissenting). The dissent further observed that, unlike other federal agencies that may be in a position to act with "greater measurable precision," the FCC's

task of "[p]reserving the 'marketplace of ideas' does not easily lend itself to mathematical certitude." *Id.* at 108a. Thus, "[b]y requiring the Commission to craft a set of media ownership rules that perfectly account for the effects of concentration, economic efficiency, diversity and future technological progress," the majority had "impede[d] the review process established by Congress." *Id.* at 115a.

With respect to the cross-media limits and the use of the Diversity Index, Chief Judge Scirica found that the Commission's "methodological choices and line-drawing" deserve deference. *Id.* at 159a. He further recognized that the Index "is not the final rule, nor the sole consideration relied upon" in crafting the new rules, "but rather a tool created to provide the Cross-Media Limits with empirical footing." *Id.* at 160a. While the "majority, apparently, would have chosen a different approach," the Court's "disagreement with the Commission's conclusions on such matters does not render [them] arbitrary and capricious." *Id.* at 173a.

In addition, Chief Judge Scirica emphasized that Section 202(h) "overlays a deregulatory tenor" on the FCC's decisions. *Id.* at 125a. In particular, he noted that the statute imposes a "presumption" that "a regulation will be vacated or modified if it does not continue to be in the public interest," thus imposing an obligation on the agency that is "different from the traditional approach to rule retention, which would counsel for rule retention unless there were reasons to change it." *Id.* at 122a.

4. Petitions for Rehearing

Several petitions for panel rehearing were filed with the Third Circuit, including a motion for a partial lifting of the stay on the cross-media limits in large markets. *See* Motion of Petitioner Tribune Company for a Partial Lifting of This Court's Stay of the FCC's Cross-Ownership Rules, Nos. 03-3888, *et al.* (July 21, 2004). That petition was denied. *See* Order, Nos. 03-3388, *et al.* (Sept. 3. 2004), at 193a. Tellingly, the only rehearing petition granted by the Court

was one filed by the FCC to implement certain limited aspects of its local radio ownership rule that generally were intended to tighten restrictions on common ownership.[11]

REASONS FOR GRANTING THE PETITION

I. Review By This Court Of The Question Presented Is Necessary Because Of The Exceptional Importance Of The Regulations At Issue To The Newspaper Publishing And Broadcast Industries And The American Public

This case bears directly upon the ability of both daily newspapers and broadcasters—unquestionably among the nation's most important local news outlets—to deliver high quality news and other vital information to the American public and to remain competitive in today's increasingly challenging multimedia environment. The Third Circuit's decision also needlessly thwarts the FCC's capacity to carry out its statutory mandate to bring the broadcast regulatory regime into alignment with the vast technological and regulatory changes that have transformed the media landscape in recent years. Further, the decision frustrates the agency's ability to provide regulatory certainty to newspaper publishers and broadcasters. As a result of the unduly intrusive review by the Court of Appeals, the agency's ability to craft any broadcast ownership rules of general applicability in its remand proceeding is gravely jeopardized. Absent review and reversal by this Court, the standards put in place by the Third Circuit also will govern the agency's future periodic review proceedings and, indeed, obstruct any future efforts by the agency to make reasonable line-drawing determinations.

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11. Among other things, the Court granted the FCC's request to count radio stations brokered pursuant to advertising joint sales agreements against the local radio ownership totals, to switch from a contour-based system to the use of the generally more limited Arbitron Metro markets in defining local markets, and to restrict transfers of combinations that do not comply with the revised radio rule. *See* Order, Nos. 03-3388, *et al.* (Sept. 3, 2004), at 193a.

Notably, the *Prometheus* decision perpetuates a pattern of adverse judicial review that has systematically undermined the ability of the FCC to carry out the periodic review obligations imposed on it by Congress in Section 202(h). While the D.C. Circuit determined in *Fox* and *Sinclair* that the agency's biennial review decisions had not provided adequate reasons for the *retention* of certain ownership limits, the Third Circuit—after a series of extraordinary procedural decisions that ousted the D.C. Circuit from a continuing role in the appellate process—found that the deregulation had gone too far and that the agency had not provided sufficient justification for its decisions to relax its rules. As a result, the agency has been able to accomplish remarkably little change to its broadcast regulatory regime—and none to the newspaper/broadcast cross-ownership ban—since Section 202(h) was enacted nearly nine years ago.

Unlike the other media subject to FCC broadcast ownership regulation, newspaper publishers have been left without any regulatory relief whatsoever since the absolute ban was implemented nearly three decades ago. This inequity persists despite the overwhelming record evidence that broadcasters jointly owned with newspapers are superior providers of news and information and, thus, that permitting cross-ownership would benefit the American public significantly. Accordingly, review by this Court is urgently needed to clarify the proper boundaries of appellate review of the FCC's efforts to comply with Section 202(h). Review also is needed to ensure that the agency is given the flexibility to carry out its statutory obligation to review its long outdated newspaper/broadcast and other ownership regulations and reconcile them with the realities of the contemporary marketplace.

II. Further Review Is Necessary To Resolve Conflicting Interpretations Of Section 202(h) Of The Telecommunications Act Of 1996 And To Permit The FCC To Carry Out Its Deregulatory Mandate

Consistent with the deregulatory goals underlying the 1996 Act, Section 202(h) imposes a heightened burden on the FCC to justify the retention of existing broadcast ownership regulations and to relax or eliminate those that are outdated. Traditional tools of statutory construction, including the language of the Act, the design and context of the statute, and its legislative history, all confirm that Congress expected Section 202(h) to drive comprehensive deregulation.

As noted above, Section 202(h) by its terms specifically directs the agency every two years (now every four years) to determine whether its broadcast ownership rules are "necessary in the public interest as a result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act, § 202(h); *see supra* note 3. Thus, the plainly worded intent of the provision is deregulatory—to require the agency to jettison those rules that no longer are needed in light of changes in the competitive landscape. Similarly, the Act's preamble recites that its enactment is intended "to promote competition and *reduce regulation*." 1996 Act, preamble (emphasis added).

The deregulatory design of Section 202 itself is also striking. After reciting six explicit changes that eliminate or relax existing restraints, the provision concludes with what might be considered an affirmative "mop up" mandate: the FCC must continue the work that Congress has begun by reevaluating the agency's ownership limits regularly in light of competitive marketplace developments and then "repeal[ing] or modify[ing]" the rules as contemporary facts require. *See Fox*, 280 F.3d at 1033 ("process of deregulation" to extend into the future). Finally, the legislative history

provides further verification that the intent of the statute was to eliminate unnecessary regulation. *See, e.g.*, S. Conf. Rep. No. 104-230, at 1 (1996) (statute was meant to provide a "pro-competitive, de-regulatory national policy framework").

Therefore, as the D.C. Circuit initially concluded, and the FCC acknowledged in its 2003 decision, "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." *Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159; *2003 Order* at 215a.[12] The D.C. Circuit's decisions in *Fox* and *Sinclair* reflect its understanding of Congress' deregulatory intent, as the Court in those cases found that the agency had failed to meet its statutory obligation to justify the retention of the NTSO cap, the cable/TV restriction, and the "eight voices" component of the local television ownership rule.

In *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004), a case dealing with the biennial review mandate of Section 11 of the 1996 Act, not Section 202(h),[13] the D.C. Circuit interpreted the phrase "necessary in the public interest" in a different manner than it had in *Fox* and *Sinclair*. In particular, the Court departed from its earlier conclusion that this language requires the Commission to find that a regulation it wishes to retain remains "indispensable" to, and not merely consonant with, the public interest. *Cellco*, 357 F.3d at 96-97; *see also Fox*, 280 F.3d at 1050. Even in *Cellco*, however, the Court continued to stress the "deregulatory purpose" of the provision and agreed with the FCC that, where the conditions of the statute are met, it "creates a

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12. Similarly, the Commission correctly acknowledged in its *2003 Order* that "Section 202(h) appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *2003 Order* at 215a.

13. Section 11 of the 1996 Act requires the agency to periodically review its telecommunications (as opposed to the broadcast ownership) regulations and determine whether they remain "necessary in the public interest." 47 U.S.C. § 161.

presumption in favor of repealing or modifying covered rules." *Cellco*, 357 F.3d. at 97; *see also Prometheus* at 122a (Scirica, C.J., dissenting) (concluding that the "'presumption' . . . is that a regulation will be vacated or modified if it does not continue to be in the public interest").[14]

The *Prometheus* decision eliminates the last vestiges of Congress' deregulatory intentions from the statute and creates a direct conflict between the D.C. Circuit's and the Third Circuit's interpretations of the FCC's periodic review obligations. By declining to transfer the case to the D.C. Circuit,[15] which had heard all previous appeals relating to the rules in question, substituting its views for the agency's measured deregulatory steps, and extending its stay and retaining jurisdiction pending the outcome of the remand proceeding, the majority compelled the FCC to maintain the pre-existing cross-ownership ban in place indefinitely. The Court took this action despite its own recognition that Section 202(h) requires that a regulation deemed no longer useful "must be vacated or modified" *and* its agreement with the Commission's determination that an absolute ban on newspaper/broadcast cross-ownership can no longer be justified. *Prometheus* at 40a-44a; *see also id.* at 35a

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14. Similarly, in *Cellular Telecommunications & Internet Ass'n v. FCC*, 330 F.3d 502, 512 (D.C. Cir. 2003), the D.C. Circuit interpreted the term "necessary" in Section 10 of the Communications Act, 47 U.S.C. § 160, as obligating the FCC to demonstrate "the existence of a strong connection" between its regulation and the goal it seeks to accomplish.

15. As demonstrated in the motion to transfer venue filed by the broadcast networks, this decision was inconsistent with a long line of precedent under 28 U.S.C. § 2112 holding that, when an agency adopts an order on remand from a prior court of appeals decision, it is appropriate to transfer any further appeal proceedings to the Circuit Court that decided the first case. *See* Network Petitioners' Joint Motion to Transfer Venue, Nos. 03-3388, *et al.* (Aug. 22, 2003). As Chief Judge Scirica explained, "[s]ound judicial administration and consistency favor transferring this matter to the D.C. Circuit." *See* Order, Nos. 03-3388, *et al.* (Sept. 15, 2003) (Scirica, C.J., dissenting), at 203a.

(explaining that, if ownership regulations are determined to be "no longer useful, they must be repealed or modified"). The Third Circuit decision thus effectively nullifies the deregulatory mandate that unquestionably is triggered, under *any* of the D.C. Circuit decisions, once the conditions of Section 202(h) are met.

Equally troubling, and in direct contrast to the holdings of the D.C. Circuit questioning the FCC's bases for *retaining* existing ownership restrictions, the Third Circuit went so far as to find that the biennial review mandate actually contemplated an *expansion* of the agency's ownership restrictions. Specifically, the Court did "not accept that the 'repeal or modify in the public interest' instruction must . . . operate only as a one-way ratchet" or "that the Commission can use the review process only to eliminate then-extant regulations." *Id.* at 34a.

The Third Circuit erroneously suggested that Section 202(h) is only "deregulatory" in the sense that it "requires the Commission periodically to justify its existing regulations, an obligation it would not otherwise have." *Id.* at 34a. The agency would, however, have an obligation to ensure that its rules continue to serve the public interest, even absent Section 202(h). Under governing principles of administrative law, it has long been established that the FCC cannot rest on a rule if "time and changing circumstances reveal that the 'public interest' is not served by application of the Regulation[ ]." *NBC v. United States*, 319 U.S. 190, 225 (1943). The Commission *already* has an ongoing obligation to "evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would." *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *rev'd and remanded*, 10 F.3d 875 (D.C. Cir. 1993). Thus, as the D.C. Circuit correctly recognized, Section 202(h) imposes a separate, distinct, and additional obligation on the FCC to clear away the regulatory underbrush. *See Cellco*, 357 F.3d

at 99 ("[T]he Commission is under a mandate that extends beyond its normal monitoring responsibilities.").

For these reasons, review by this Court is necessary to provide the FCC with clarification regarding the legal boundaries of its periodic review obligations and to ensure that Congress' intent to provide a process for ongoing regulation is not frustrated.

III. The Third Circuit's Failure To Adhere To Basic Principles Of Administrative Law, If Left Unreviewed, Will Permanently Frustrate Any Deregulatory Efforts Pursuant To Section 202(h)

Even apart from the deregulatory mandate of Section 202(h), the FCC's decision to substantially relax the cross-ownership ban was fully justified and entitled to deference from the Court of Appeals. The scope of review of agency decisions under the Administrative Procedure Act is "narrow, and a court is not to substitute its judgment for that of the agency." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 5 U.S.C. § 706(2)(A); *see also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

With respect to issues involving line-drawing determinations, courts accord an especially high level of deference to agency expertise. A reviewing court "generally [is] 'unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that the lines drawn ... are patently unreasonable'" and "'have no relationship to the underlying regulatory problem.'" *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (*quoting Home Box Office, Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir. 1977)). The level of deference is ratcheted up even further "where issues involve 'elusive' and 'not easily defined' areas such as programming diversity in broadcasting." *Sinclair*, 284 F.3d at 159.

Although it paid lip service to these standards, the Third Circuit majority ultimately disregarded the high level of deference due to the lines drawn by the agency and substituted its own judgment for that of the FCC, thereby preventing the implementation of even limited deregulatory measures. *See Prometheus* at 24a-26a. As Chief Judge Scirica explained, although the majority *itself* would have accorded less weight to the Internet as a source of local news and information, would not have assumed equal market shares for outlets of the same media type, and ultimately would have adopted different rules, the choices made by the Commission were nonetheless reasonable. *See id.* at 125a-26a (Scirica, C.J., dissenting).[16]

The Third Circuit's myopic focus on the Diversity Index ignores the plain evidence, as well as the FCC's unequivocal statements, that the Index was not fundamental to the decision to relax the absolute ban and served only as a "tool" to provide the agency with some "empirical footing" for more limited restrictions. As Chief Judge Scirica found, the Diversity Index "provided the Commission with a rough picture of the amount of media diversity concentration in markets" and was a "rational effort to lend a factual foundation to a thorny regulatory question." *Id.* at 143a.

The Third Circuit also failed to provide the agency any breathing room to address the inherently "elusive" and "not-easily-defined" nature of diversity. Because "[p]reserving the 'marketplace of ideas' does not easily lend itself to mathematical certitude," the Commission "did not abdicate its judgment for formula" by employing the Diversity Index. *Id.* at 108a, 109a, 174a. In establishing rules of nationwide applicability, it makes sense that "[t]he Diversity Index—or the Cross-Media Limits for that matter—will not provide perfect limits in every local market." *Id.* at 174a. The Court

16. Indeed, given the conservative assumptions built into the Diversity Index, any flaws it may have cannot support a conclusion that the FCC's decision was overly deregulatory in effect.

also failed to acknowledge that "it is virtually impossible for any agency to compile an unchallengeable factual record in support of forward-looking rules that are designed to anticipate the future development of the marketplace." *Id.* at 114a (*citing NCCB*, 436 U.S. at 814). The majority provides no legitimate reason, moreover, why the FCC's decision to focus on the availability of media outlets, rather than strictly on market share, should not be accorded deference.

By assigning the Commission the nearly impossible task of crafting a mathematically perfect set of rules before any changes to existing, and long outdated, regulations can be implemented, the Court has derailed the periodic review process and, indeed, has impeded any future line-drawing efforts by the agency. As Judge Scirica observed, "[v]acating and remanding the proposed rules to the Commission will preserve the existing rules in place for months or even years. . . ." *Id.* at 113a-14a (internal citations omitted).

In the end, the majority's findings must be put in context by "examining the underlying rules and the FCC's rationale for the changes." *Id.* at 126a. Among the factors that must be taken into consideration are "the evolution of the challenged rules" and the FCC's "goals and objectives in its biennial review." *Id.* When examined from this appropriately broad perspective, it is clear that the Commission's decisions to relax the cross-ownership ban and certain other media ownership limits "were neither arbitrary nor capricious," and the Court of Appeals should not have stood in the way of the long overdue but measured regulatory relief proposed by the agency. *Id.*

IV. Further Review Is Necessary To Enable The Court To Take Up The Question Of The Proper Level Of First Amendment Scrutiny For Media Ownership Regulation

In finding that continued regulation of cross-ownership was subject to only "rational basis" review under the First Amendment, the Court of Appeals stated that it was bound by the Supreme Court's holdings in *Red Lion* and its progeny. *See Prometheus* at 47a. Since its issuance, *Red Lion* has been the subject of intense criticism, and this Court has indicated that it would review the question of its continuing validity when the time was right.

As illustrated by the FCC's extensive analysis of the current marketplace in its *2003 Order*, *see* 255a-288a, the mass media landscape has changed drastically since the 1960s when broadcasting was the only form of electronic mass media and the "scarcity rationale" was first developed. Thus, the old theory of spectrum scarcity can no longer be invoked to justify a lower level of judicial scrutiny for broadcast ownership regulations than for regulations affecting other media. *Cf. Red Lion*, 395 U.S. at 389-90. Indeed, over twenty years ago, the Supreme Court itself suggested that the advent of new technologies may soon render "the scarcity doctrine" obsolete. *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n.11, *appeal dismissed*, 468 U.S. 1205 (1984).[17]

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17. The Court declined to reconsider the *Red Lion* doctrine at the time, however, "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.* As early as 1985, "the Commission sought to respond to the Supreme Court's invitation," and found "explosive growth of information sources—in both traditional broadcasting sources (radio and television) and new substitutes for broadcasting such as cable TV, SMATV, VCRs, and LPTV." *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987). The FCC concluded that the scarcity rationale "is no longer sustainable in the vastly transformed, diverse market that exists today." *Syracuse Peace Council against Television Station*

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The Commission as well as reviewing courts have acknowledged, however, that their hands continue to be tied by the scarcity doctrine. *See, e.g., Fox*, 280 F.3d at 1046; *Sinclair*, 284 F.3d at 161, 167-69; *Tribune Company v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1998). Relying expressly on the findings in *Fox* and *Sinclair*, the FCC applied the "rational basis" standard in its own 2003 media ownership decision. *See 2003 Order* at 215a-17a. The Third Circuit followed suit. *See Prometheus* at 46a-48a.

In addition, in rejecting the claim that the cross-ownership limits discriminate against newspaper publishers in violation of the First and Fifth Amendments, the Third Circuit concluded that "[t]his argument is foreclosed, however, by the Supreme Court's decision in *NCCB* that endorsed the constitutionality of the 1975 . . . cross-ownership ban." *Id.* at 45a. Specifically, the Court in *NCCB* found that "the [FCC's ownership] regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple ownership rules." *NCCB*, 436 U.S. at 801. With the exception of the newspaper/broadcast ban, however, every other FCC broadcast ownership restriction has been either substantially relaxed or eliminated in recent years. In addition, the competing media that have emerged since 1975—such as cable television, direct broadcast satellite ("DBS") service, and the Internet—are free from FCC ownership restrictions.

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WTVH Syracuse, NY, 2 FCC Rcd 5043, 5053 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989). Similarly, in the context of 1996 Act, the House Commerce Committee observed that, in light of vast changes in the mass media marketplace, "the scarcity rationale for government regulation no longer applies." Communications Act of 1995, H.R. Rep. No. 104-204, 104th Cong., 1st Sess., at 54 (July 24, 1995).

Accordingly, the time is ripe for this Court to take a fresh look at the standard of First Amendment protection applied to broadcasters. Had the Third Circuit been required to apply the standard of intermediate or strict scrutiny that would apply to any other type of media outlet, the Court certainly would have been constrained to find that the prohibition on newspaper/broadcast cross-ownership is no longer sustainable under the First Amendment, and that repeal or, at least, significant relaxation of the rule is constitutionally compelled.

CONCLUSION

For the forgoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

TELECOMMUNICATIONS ACT OF 1996, § 202, PUB. L. NO. 104-104 (1996), 110 STAT. 156, BROADCAST OWNERSHIP

(a) *National Radio Station Ownership Rule Changes Required*: The Commission shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.

(b) *Local Radio Diversity.*

(1) *Applicable Caps*: The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that—

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) *Exception*: Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

(c) *Television Ownership Limitations*:

(1) *National Ownership Limitations*: The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)—

(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

(B) by increasing the national audience reach limitation for television stations to 35 percent.

(2) *Local Ownership Limitations*: The Commission shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market.

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(d) *Relaxation of One-To-A-Market*: With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the Commission shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity.

(e) *Dual Network Changes*: The Commission shall revise section 73.658(g) of its regulations (47 C.F.R. 658(g)) to permit a television broadcast station to affiliate with a person or entity that maintains 2 or more networks of television broadcast stations unless such dual or multiple networks are composed of—

(1) two or more persons or entities that, on the date of enactment of the Telecommunications Act of 1996, are 'networks' as defined in section 73.3613(a)(1) of the Commission's regulations (47 C.F.R. 73.3613(a)(1)); or

(2) any network described in paragraph (1) and an English-language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes (as measured by a national ratings service).

(f) *Cable Cross Ownership*:

(1) *Elimination of Restrictions*: The Commission shall revise section 76.501 of its regulations (47 C.F.R. 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system.

(2) *Safeguards Against Discrimination*: The Commission shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1).

(g) *Local Marketing Agreements*: Nothing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission.

(h) *Further Commission Review*: The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

(i) *Elimination of Statutory Restriction*: Section 613(a) (47 U.S.C. 533(a)) is amended—

(1) by striking paragraph (1);

(2) by redesignating paragraph (2) as subsection (a);

(3) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively;

(4) by striking 'and' at the end of paragraph (1) (as so redesignated);

(5) by striking the period at the end of paragraph (2) (as so redesignated) and inserting '; and'; and

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(6) by adding at the end the following new paragraph:

'(3) shall not apply the requirements of this subsection to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 623(l).'.

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47 C.F.R. § 73.3555 MULTIPLE OWNERSHIP

Pre-2003 Regulations (in Effect Pursuant to *Prometheus*):

(a)(1) *Radio contour overlap rule.* No license for an AM or FM broadcasting station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the principal community contour of that station and the principal community contour of any other broadcasting station directly or indirectly owned, operated, or controlled by the same party, except that such license may be granted in connection with a transfer or assignment from an existing party with such interests, or in the following circumstances:

(i) In a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(iv) In a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

(3) For purposes of this paragraph (a):

(i) The "principal community contour" for AM stations is the predicted or measured 5 mV/m groundwave contour computed in accordance with Sec. 73.183 or Sec. 73.186 and for FM stations is the predicted 3.16 mV/m contour computed in accordance with Sec. 73.313.

(ii) The number of stations in a radio market is the number of commercial stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations in question (i.e., the station for which an authorization is sought and any station in the same service that would be commonly owned whose principal community contour overlaps the principal community contour of that station). In addition, if the area of overlap between the stations in question is overlapped by the principal community contour of a commonly owned station or stations in a different service (AM or FM), the number of stations in the market includes stations whose principal community contours overlap the principal community contours of such commonly owned station or stations in a different service.

(b) *Local television multiple ownership rule.* An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) only under one or more of the following conditions:

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(1) The Grade B contours of the stations (as determined by Sec. 73.684 of this part) do not overlap; or

(2)

(i) At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9:00 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. Count only those stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination. In areas where there is no Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination.

(c) *Radio-television cross ownership rule.* (1) This rule is triggered when:

(i) The predicted or measured 1 mV/m contour of an existing or proposed FM station (computed in accordance with Sec. 73.313 of this part) encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s)

of the TV broadcast station(s) (computed in accordance with Sec. 73.684) encompasses the entire community of license of the FM station; or

(ii) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station (computed in accordance with Sec. 73.183 or Sec. 73.386), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with Sec. 73.684) encompass(es) the entire community of license of the AM station.

(2) An entity may directly or indirectly own, operate, or control up to two commercial TV stations (if permitted by paragraph (b) of this section, the local television multiple ownership rule) and 1 commercial radio station situated as described above in paragraph (1) of this section. An entity may not exceed these numbers, except as follows:

(i) If at least 20 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to:

(A) Two commercial TV and six commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule); or

(B) One commercial TV and seven commercial radio stations (to the extent that an entity would be permitted to own two commercial TV and six commercial radio stations under paragraph (c)(2)(i)(A) of this section, and to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(ii) If at least 10 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to two commercial TV and four commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(3) To determine how many media voices would remain in the market, count the following:

(i) TV stations: independently owned and operating full-power broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license that have Grade B signal contours that overlap with the Grade B signal contour(s) of the TV station(s) at issue;

(ii) Radio stations:

(A)(1) Independently owned operating primary broadcast radio stations that are in the radio metro market (as defined by Arbitron or another nationally recognized audience rating service) of: (i) The TV station's (or stations') community (or communities) of license; or (ii) The radio station's (or stations') community (or communities) of license; and

(2) Independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron or another nationally recognized audience rating service.

(B) When a proposed combination involves stations in different radio markets, the voice requirement must be met in each market; the radio stations of different radio metro markets may not be counted together.

(C) In areas where there is no radio metro market, count the radio stations present in an area that would be the functional equivalent of a radio market.

(iii) Newspapers: English-language newspapers that are published at least four days a week within the TV station's DMA and that have a circulation exceeding 5% of the households in the DMA; and

(iv) One cable system: if cable television is generally available to households in the DMA. Cable television counts as only one voice in the DMA, regardless of how many individual cable systems operate in the DMA.

(d) *Daily newspaper cross-ownership rule.* No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with Sec. 73.183 or Sec. 73.186, encompassing the entire community in which such newspaper is published; or

(2) The predicted 1 mV/m contour for an FM station, computed in accordance with Sec. 73.313, encompassing the entire community in which such newspaper is published; or

(3) The Grade A contour of a TV station, computed in accordance with Sec. 73.684, encompassing the entire community in which such newspaper is published.

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(e)(1) National television multiple ownership rule. No license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent.

(2) For purposes of this paragraph (e):

(i) National audience reach means the total number of television households in the Nielsen Designated Market Area (DMA) markets in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

(f) The ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations. However, the attribution standards set forth in the Notes to this section will be used to determine attribution for noncommercial educational FM and TV applicants, such as in evaluating mutually exclusive applications pursuant to subpart K.

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Revised Regulations (Adopted in *2003 Order*):

(a) (1) *Local radio ownership rule.* A person or single entity (or entities under common control) may have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits:

(i) In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations, not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations, not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iv) In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM); provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.

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(b) *Local television multiple ownership rule.*

(1) For purposes of this section, a television station's market shall be defined as the Designated Market Area (DMA) to which it is assigned by Nielsen Media Research or any successor entity at the time the application to acquire or construct the station(s) is filed. Puerto Rico, Guam, and the U.S. Virgin Islands each will be considered a single market.

(2) An entity may have a cognizable interest in more than one full-power commercial television broadcast station in the same DMA in accordance with the following conditions and limits:

(i) the time the application to acquire or construct the station(s) is filed, no more than one of the stations that will be attributed to such entity is ranked among the top four stations in the DMA, based on the most recent all-day (9:00 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii)

(A) Subject to (2)(i) above, in a DMA with 17 or fewer full-power commercial and noncommercial television broadcast stations, an entity may have a cognizable interest in no more than 2 commercial television broadcast stations; or

(B) Subject to (2)(i) above, in a DMA with 18 or more full-power commercial and noncommercial television broadcast stations, an entity may have a cognizable interest in no more than 3 commercial television broadcast stations.

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(c) *Cross-Media Limits.* Cross-ownership of a daily newspaper and commercial broadcast stations, or of commercial broadcast radio and television stations, is permitted without limitation except as follows:

(1) In Nielsen Designated Market Areas (DMAs) to which three or fewer full-power commercial and noncommercial educational television stations are assigned, no newspaper/broadcast or radio/television cross-ownership is permitted.

(2) In DMAs to which at least four but not more than eight full-power commercial and noncommercial educational television stations are assigned, an entity that directly or indirectly owns, operates or controls a daily newspaper may have a cognizable interest in either: (i) one, but not more than one, commercial television station in combination with radio stations up to 50% of the applicable local radio limit for the market; or (ii) radio stations up to 100% of the applicable local radio limit if it does not have a cognizable interest in a television station in the market.

(3) The foregoing limits on newspaper/broadcast cross-ownership do not apply to any new daily newspaper inaugurated by a broadcaster.

(d) *National television multiple ownership rule.*

(1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding forty-five (45) percent.

(2) For purposes of this paragraph (d):

(i) National audience reach means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

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Nos. 04-1020, 04-1033, 04-1036, 04-1045, and 04-1177

In the Supreme Court of the United States

MEDIA GENERAL, INC., PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER
v.
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TRIBUNE COMPANY, ET AL., PETITIONERS
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SINCLAIR BROADCAST GROUP, INC., CROSS-PETITIONER
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ON PETITIONS AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 202(h) of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 111-112, requires the Federal Communications Commission to determine periodically whether its rules governing ownership of federally licensed broadcast stations remain "necessary in the public interest," and to "repeal or modify" any such rule that the FCC determines is "no longer in the public interest." Pursuant to that directive, the FCC determined in this case to: (1) replace its ban on cross-ownership of daily newspapers and broadcast stations with a cross-media rule that permits such combinations in most markets; (2) relax its local television ownership rule to generally allow common ownership of two or (in larger markets) three television stations; and (3) modify its local radio ownership rule by tightening the rule in some respects and loosening it in other respects. The questions presented are:

1. Whether the FCC's revised broadcast ownership rules violate the First or Fifth Amendment rights of newspaper owners and broadcast station licensees.

2. Whether the FCC's revised broadcast ownership rules violate Section 202(h) of the 1996 Act.

3. Whether the FCC's revised broadcast ownership rules are supported by a reasoned analysis under the Administrative Procedure Act.

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ON PETITIONS AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-190a[1]) is reported at 373 F.3d 372. The report and order of the Federal Communications Commission (Pet. App. 206a-723a) is reported at 18 F.C.C.R. 13,620.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2004. A petition for panel rehearing was granted in part on September 3, 2004 (Pet. App. 191a-193a). On November 22, 2004, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 3, 2005, and on December 21, 2004, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including January 31, 2005. The petitions in Nos. 04-1020, 04-1033, 04-1036, and 04-1045 were filed on January 28 and January 31, 2005. The cross-petition in No. 04-1177 was filed on March 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 (Communications Act), 47 U.S.C. 151 *et seq.*, establishes a comprehensive framework for federal regulation of the transmission and use of radio signals in the United States. The Act establishes a federal policy of "maintain[ing] the control of the United States over all the channels of radio transmission" and "provid[ing] for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act thus requires persons seeking to engage in radio or television broadcasting to obtain a broadcast license

[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 04-1020.

for a limited, but renewable, period of time from the Federal Communications Commission, *ibid.*, and prohibits the assignment or transfer of any such license without the Commission's prior approval, 47 U.S.C. 309(h), 310(d).

Before it may grant, renew, or approve the assignment or transfer of a broadcast license, the Commission must conclude that such action would serve the "public interest, convenience, and necessity." 47 U.S.C. 309(a), 310(d); see 47 U.S.C. 309(k). Among the policies the Commission has advanced in exercising its broadcast licensing responsibilities is a policy favoring diversification of mass media ownership as benefiting the public interest "by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (*NCCB*).

To facilitate even-handed implementation of its policies and to provide certainty to the broadcast industry, the Commission has adopted generally applicable regulations that embody its judgments about the circumstances in which the issuance, assignment, or transfer of a broadcast station license would serve the public interest. See, *e.g.*, *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 202-205 (1956). Those regulations have long imposed limits on the number of radio or television stations a single party may own nationally or in a local market, as well as limits on cross-ownership of broadcast stations and other media in the same market. See, *e.g.*, *ibid.* (upholding ownership limits on radio and television stations); *NCCB*, 436 U.S. at 793-802 (upholding prohibition on cross-ownership of daily newspapers and broadcast stations). The Commission deems proposed broadcast combinations that violate its ownership limits inconsistent with the public interest, absent a showing that waiver of a rule is warranted in a particular case. See *id.* at 793; *Storer Broad. Co.*, 351 U.S. at 205; *National Broad. Co.* v. *United States*, 319 U.S. 190, 225 (1943) (*NBC*).

2. In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress directed the Commission to make a number of changes to its broadcast ownership rules. See 1996 Act § 202(a)-(f), 110 Stat. 110-111. In addition, Section 202(h) of the 1996 Act imposed a general duty on the Commission to review its ownership rules periodically to determine "whether any of such rules are necessary in the public interest as the result of competition," 110 Stat. 112, and to "repeal or modify any regulation it determines to be no longer in the public interest." *Ibid.* Section 202(h) originally directed the Commission to review its ownership rules biennially, 110 Stat. 111, but in 2004, while this case was pending in the court of appeals, Congress amended the statute to provide for Commission review every four years. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, § 629, 118 Stat. 99.

In a pair of cases decided in 2002, the D.C. Circuit examined the effect of Section 202(h) on the Commission's authority to regulate broadcast ownership in the public interest. First, in *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, modified on reh'g, 293 F.3d 537 (2002), the D.C. Circuit examined the Commission's decision in the first biennial review under Section 202(h) to retain without modification existing rules on national television station ownership and on cross-ownership of television stations and cable systems in local markets. The court emphasized that "nothing in § 202(h) signals a departure from [the] historic scope" of the Commission's public interest authority. *Id.* at 1042. The court concluded that Section 202(h) requires the Commission, if it decides to retain a particular ownership rule, to provide an adequate explanation for its decision that accounts for the state of competition in the relevant media markets.[2] See *id.* at

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[2] The *Fox* panel initially interpreted the phrase "necessary in the public interest" in Section 202(h) to mean that a "regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest." 280 F.3d at 1050. On rehearing, the panel modified its decision to leave open

1042, 1044. Because, in the court's view, the Commission had not adequately explained its decision to retain the national television and cable-television cross-owner rule, the court remanded those rules to the Commission for further consideration. [3]

In *Sinclair Broadcast Group, Inc.* v. *FCC*, 284 F.3d 148 (2002), the D.C. Circuit remanded (but did not vacate) the Commission's 1999 revision of the local television ownership rule. The revised rule allowed common ownership of two television stations in a local market where neither station is among the top-four rated stations in the market (the "top-four" test) and the market contains at least eight other "voices," which the Commission defined as independently owned and operating, full-power television stations. The *Sinclair* court recognized that the Commission "has wide discretion to determine where to draw administrative lines." *Id.* at 162, 170 (internal quotation marks omitted). The court remanded the rule, however, because it concluded that the Commission had not adequately explained why it counted only television stations as voices in the local television ownership rule, while counting other media outlets (including daily newspapers and cable systems) as voices in its rule governing cross-ownership of radio and television stations. *Id.* at 164.

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the question of the standard that the Commission must meet under Section 202(h). 293 F.3d at 541. In *Cellco Partnership* v. *FCC*, 357 F.3d 88 (2004), the D.C. Circuit subsequently held that the Commission reasonably interpreted similar language in Section 11 of the Communications Act, 47 U.S.C. 161, to require it only to "reevaluate regulations in light of current competitive market conditions to see that the conclusion [it] reached in adopting the rule—that [the rule] was needed to further the public interest—remains valid." 357 F.3d at 98 (internal quotation marks omitted).

[3] Although the *Fox* court vacated the cable-television cross-ownership restriction, it remanded the national television ownership rule without vacating it because the court concluded that the Commission might be able to justify retention of the rule on remand. 280 F.3d at 1049.

3. In September 2002, the Commission initiated its third biennial proceeding under Section 202(h) to review its broadcast ownership rules. *2002 Biennial Regulatory Review*, 17 F.C.C.R. 18,503 (2002). The 2002 biennial review sought comment on the D.C. Circuit's decisions in *Fox* and *Sinclair*. *Id.* at 18,508-18,512 ¶¶ 12-19. The proceeding also incorporated other rulemaking proceedings that the Commission had previously initiated to reexamine its regulations governing local radio station ownership and cross-ownership of daily newspapers and broadcast stations. *Id.* at 18,506 ¶ 7.

The consolidated biennial review proceeding culminated on July 2, 2003, with the release of the Report and Order at issue in this case. As relevant here, the Report and Order established a single new cross-media rule to govern cross-ownership of daily newspapers, television stations, and radio stations, and modified two other rules that limit common ownership of multiple radio and multiple television stations in a local market.

Cross-media rule. The cross-media rule replaced, *inter alia*, the blanket prohibition on common ownership of daily newspapers and broadcast stations that this Court upheld in *NCCB*. The cross-media rule prohibits combinations involving a daily newspaper and a broadcast station, or a radio station and a television station, in local markets with three or fewer television stations. Pet. App. 521a-522a (Order ¶ 454); 04-1036 Pet. App. 661a. In local markets that have four to eight television stations, such cross-media combinations are permitted with certain limitations. Pet. App. 530a (Order ¶ 466); 04-1036 Pet. App. 661a. In local markets with nine or more television stations, the Commission imposed no cross-media limit. Pet. App. 534a (Order ¶ 473).

Local television ownership rule. In response to the decision in *Sinclair*, the Commission relaxed the local television ownership rule by replacing the "eight-voice" test with a tiered approach in which ownership limits are tied to the number of television stations in the market. Under the revised rule, a party may

own two commercial television stations in individual markets with 17 or fewer television stations and three commercial stations in markets with 18 or more television stations. Pet. App. 290a-291a (Order ¶ 134); 04-1036 Pet. App. 660a-661a. The revised rule continues to prohibit combinations involving the four highest-rated television stations in the market. Pet. App. 331-332a (Order ¶ 186); 04-1036 Pet. App. 661a. That "top four" restriction thus precludes common ownership of multiple television stations in markets with four stations or fewer.

Local radio ownership rule. The Commission did not modify the numerical limits in the local radio ownership rule, which Congress had directed the Commission to establish in the 1996 Act. See 1996 Act § 202(b), 110 Stat. 110. The Commission did revise the method of determining the scope of the radio market to which the fule's numerical limits apply, Pet. App. 390a-391a (Order ¶¶ 273-274); it required inclusion of noncommercial radio stations when counting the number of radio stations in the market, *id.* at 408a (Order ¶ 295), see 04-1036 Pet. App. 659-660a; and it counted certain agreements concerning the sale of radio advertising (commonly called "Joint Sales Agreements") as ownership interests for purposes of applying the ownership limits, Pet. App. 422a-429a (Order ¶¶ 316-325); see also 04-1036 Pet. App. 664a-665a.[4]

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[4] The 2002 biennial review also addressed two other rules related to ownership of television stations. The Commission decided to retain its "dual network" rule, which prohibits mergers among the top-four broadcast television networks (ABC, NBC, CBS, and Fox). Pet. App. 610a-629a (Order ¶¶ 592-621). That decision was not challenged in the court of appeals. In addition, the Commission relaxed its national television ownership rule to allow common ownership of television stations that reach 45% (as opposed to the previous limit of 35%) of the national television audience. *Id.* at 552a-610a (Order ¶¶ 499-591). In 2004, while this case was pending before the court of appeals, Congress amended the 1996 Act to increase the national television audience reach limitation from 35% to 39%, and provided that rules relating to that limitation would no longer be subject to the now-quadrennial review

4. Petitions for review were filed in several circuits, triggering a judicial lottery under 28 U.S.C. 2112(a)(3). The Third Circuit was selected to review the Commission's decision. On September 3, 2003, the court of appeals stayed the Commission's revised rules pending its review of the Report and Order. Pet. App. 194a-196a. The court also declined to transfer the case to the Court of Appeals for the District of Columbia Circuit. *Id.* at 197a-205a.

5. a. On June 24, 2004, the Third Circuit issued its decision on the merits. All three judges on the panel determined that the Commission's limits on broadcast ownership do not violate the First and Fifth Amendment rights of newspaper owners and broadcasters. Pet. App. 45a-48a.[5] The court stated that petitioners' First Amendment arguments were foreclosed by *NCCB*, in which this Court upheld the nationwide ban on newspaper-broadcast cross-ownership as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 46a (quoting *NCCB*, 436 U.S. at 802). In addition, the court stated that, even if *NCCB* did not control, it would assess petitioners' First Amendment challenge under rational-basis review in light of the continuing physical scarcity of broadcast spectrum. *Id.* at 47a (noting that "many more people would like access to [broadcast spectrum] than can be accommodated"). Similarly, the court of appeals concluded that petitioners' equal protection claims were foreclosed by this Court's rejection in *NCCB* of an equal protection challenge to the newspaper-broadcast cross-ownership restriction. *Id.* at 45a-46a. The court added that the devel-

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process. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, § 629, 118 Stat. 99. The court of appeals in this case found that the challenge to that limitation was thereby rendered moot. See Pet. App. 36a-38a.

[5] Although Chief Judge Scirica did not join the panel majority's analysis of the petitioners' constitutional claims, his conclusion that the Commission's ownership rules should have been affirmed is an implicit rejection of such claims. See Pet. App. 190a.

opment of more media outlets since *NCCB* was not a basis for reaching a different result, because it could not be "assumed that these media outlets contribute significantly to viewpoint diversity as sources of *local* news and information." *Id.* at 46a (emphasis added).

The court likewise rejected petitioners' arguments that Section 202(h) of the 1996 Act limited the Commission's authority to adopt more restrictive ownership rules and imposed a heightened burden on the Commission to justify any ownership limits that it decides to retain. Pet. App. 26a-36a; see *id.* at 124a (Scirica, J., dissenting) ("[T]he statute does not foreclose the possibility of increased regulation under the biennial review if the Commission finds such action in the public interest.").

b. In a portion of the panel opinion from which Chief Judge Scirica dissented, the court of appeals concluded that the Commission's cross-media rule and local television and radio rules should be remanded for "additional justification or modification." Pet. App. 12a. For each of the three rules, the majority rejected the specific limits that the Commission had adopted (or, in the case of the local radio rule, retained). The majority emphasized that it was not passing final judgment on the ultimate permissibility of the particular ownership limits chosen by the Commission. Instead, the court stated, "the Commission gets another chance to justify its actions." *Id.* at 12a n.3.

Cross-Media Rule. The court of appeals held that the Commission's determination that "the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest" was "justified under § 202(h) [of the 1996 Act] and is supported by record evidence." Pet. App. 40a; see *id.* at 40a-44a. But the court concluded that some aspects of the Commission's new cross-media rule, which replaced the newspaper/broadcast cross-ownership ban, were not supported by a "reasoned analysis." *Id.* at 48a. The majority focused its criticism on the Commission's use of a Diversity Index, a tool based loosely on the

Herfindahl-Hirschman Index used in antitrust analysis, to inform its judgment in setting ownership limits for local media markets of various sizes. See *id.* at 49a. In particular, the majority rejected the Commission's decision to evaluate diversity by assigning equal weight to "all outlets within the same media type (that is, television stations, daily papers, or radio stations)." *Id.* at 58a. The court also found the Diversity Index flawed because, in the view of the panel majority, it "gave too much weight to the Internet as a media outlet," *id.* at 49a, and "allow[ed] some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed," *id.* at 63a.

Local Television Ownership Rule. The court of appeals likewise remanded, for further consideration by the agency, the specific local television ownership limits that the Commission had adopted. Pet. App. 76a-79a. In constructing the local television rule, the Commission had begun with the goal of preserving six equal-sized competitors (see *id.* at 335a-336a (Order ¶ 192)), and, except for purposes of applying the top-four restriction, it treated each television station in the market as having equal significance. *Id.* at 76a. The court upheld the Commission's decision to retain the top-four restriction. But, in line with its analysis of the cross-media limits, the panel majority stated that in its view "no evidence" supported the Commission's equal weighting of local stations in setting ownership limits and further concluded that such weighting was unreasonable insofar as it allowed concentration—as measured by audience share—to exceed a Herfindahl-Hirschman Index level of 1800. *Id.* at 78a; see generally U.S. Dep't of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 1.5 (rev. Apr. 8, 1997) (designating markets with a level above 1800 as "highly concentrated"). The court therefore remanded the numerical limits for local television ownership "for the Commission to support and harmonize its rationale." Pet. App. 79a.

Local Radio Ownership Rule. The court upheld much of the Commission's approach to local radio ownership, including the Commission's decision to adopt a new methodology for delineating local radio markets, Pet. App. 90a, and to count noncommercial stations and Joint Sales Agreements for purposes of applying the ownership rules, *id.* at 90a-91a, 96a-99a. But the court concluded that the Commission's decision to retain the specific ownership limits that had been adopted by Congress in 1996 was not supported by "reasoned analysis." *Id.* at 102a. In doing so, the panel majority again rejected the Commission's reliance on a benchmark that evaluated competition or diversity in terms of number of outlets rather than audience shares. *Id.* at 104a-106a. In the majority's view, "[i]t defies logic to assume that a combination of top-ranked stations is the competitive equal to a combination of low-ranked stations just because the two combinations have the same number of stations." *Id.* at 104a.

c. Chief Judge Scirica dissented from the court of appeals' decision to remand the FCC's ownership rules. In the Chief Judge's view, the majority had "substituted its own policy judgment for that of the * * * Commission." Pet. App. 108a. Noting that "[i]t is not the role of the judiciary to second-guess the reasoned policy judgments of an administrative agency acting within the scope of its delegated authority," the Chief Judge explained that he would have upheld the order on review, lifted the stay, and allowed the Commission's revised rules to go into effect. *Ibid.*

6. In issuing its decision, the court of appeals extended its stay of the Commission's revised broadcast ownership rules "pending [the court's] review of the Commission's action on remand." Pet. App. 107a. On September 3, 2004, in response to the government's petition for panel rehearing, the court partially lifted its stay to permit the Commission's revised local radio ownership rules—which the court had largely upheld—to go into effect. *Id.* at 193a. The court denied the government's rehearing

petition in other respects, however, and the cross-media limits and the local television ownership rules remain stayed.

ARGUMENT

Petitioners in this case are newspaper and broadcast industry parties, most of whom challenged the Commission's ownership regulations in the court of appeals. In Nos. 04-1020, 04-1036, and 04-1045, petitioners contend that the ownership regulations, particularly the cross-media rule, violate the First and Fifth Amendments to the United States Constitution. In Nos. 04-1033, 04-1036, and 04-1045, petitioners assert that the ownership rules under review had to be relaxed further—and could in no event be tightened—under Section 202(h) of the 1996 Act. Finally, petitioners in No. 04-1045—who intervened in the court of appeals in support of the FCC's cross-media rule—seek review of the Third Circuit's decision to remand and stay, rather than affirm, the Commission's revised ownership rules. None of the petitions raises any issue that merits further review by this Court in the present posture of the case.

I. FURTHER REVIEW IS UNWARRANTED BECAUSE OF THE INTERLOCUTORY POSTURE OF THIS CASE

1. This case is in an interlocutory posture and therefore does not provide an appropriate vehicle for addressing petitioners' claims. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (declining to exercise certiorari jurisdiction where the court of appeals had remanded the case); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.); see generally Robert Stern et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). That is particularly true with respect to petitioners' constitutional claims, which ask this Court to reconsider long-established doctrines and overrule past precedents against the backdrop of an unsettled regulatory regime.

Had the Third Circuit upheld the new broadcast ownership rules, this case would have presented the question whether those otherwise-valid rules could survive the stricter constitutional standards petitioners advocate. The court of appeals, however, rejected aspects of the Commission's explanations of those rules and generally stayed the rules' effectiveness pending reconsideration by the FCC on remand. In the current posture of this case, therefore, there is an unreversed determination that the Commission failed adequately to justify the new rules under ordinary, nonconstitutional standards applicable to judicial review of administrative action. In light of that ruling, and absent this Court's review of the court of appeals' case-specific application of the Administrative Procedure Act standards to the FCC's determinations, the case does not present at this time the question whether the new rules are constitutional.

Nor does this case squarely present the question whether the prior broadcast ownership rules would satisfy the new, more stringent constitutional standard petitioners advocate. The old rules were not challenged in this proceeding and, although they are temporarily now back in force due to the Third Circuit's stay of the new rules, they are likely to be changed as a result of the remand proceedings. Petitioners' constitutional challenges are thus in effect directed to future rules—as yet unadopted—that the Commission may choose to promulgate after remand, and not to any ownership rules in place today.

As this Court has long emphasized, weighty prudential considerations counsel against unnecessary pronouncements on constitutional matters; without a concrete application of the constitutional standard to a particular governmental action or rule, the Court cannot be certain that resolution of a constitutional issue is necessary.[6] The Court's reluctance to entertain abstract issues of

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[6] See, *e.g.*, *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of

constitutional law is also based on the benefits to the Court's decisionmaking process of the context provided by a particular concrete dispute; such a context is likely to help focus the Court's attention on important aspects of the legal problem and on consequences of the Court's decision that might otherwise be obscured. Because "all contingencies of attempted enforcement cannot be envisioned in advance of those applications," this Court has "found it wiser to delay passing upon the constitutionality" of a statute or regulation "until faced with cases involving particular provisions as specifically applied to persons who claim to be injured." *Watson* v. *Buck*, 313 U.S. 387, 402 (1941).

2. The interlocutory posture of the case also counsels against further review of the nonconstitutional issues presented by petitioners. In remanding the FCC's revised ownership rules, the Third Circuit correctly articulated the deferential standard of review that courts must apply in examining the Commission's ownership rules. See, *e.g.*, *NCCB*, 436 U.S. at 794; *NBC*, 319 U.S. at 219. Moreover, the court of appeals emphasized that it was not finally passing judgment on the validity of the new broadcast ownership rules, but was merely remanding for what it perceived to be an inadequacy in the Commission's justification for "certain aspects" of the new rules. Pet. App. 11a. In response to the claim that "the Commission's work * * * comes close enough to merit our approval," the court's response was "not yet." *Id.* at 12a n.3; see *ibid.* ("[T]he Commission gets another chance to justify its actions.").[7] Although the government believes the court erred in

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constitutionality * * * unless such adjudication is unavoidable."); see also *Minnick* v. *California Dep't of Corr.*, 452 U.S. 105, 122 n.30 (1981); *Rescue Army* v. *Municipal Ct.*, 331 U.S. 549, 568-569 (1947).

[7] See also Pet. App. 58a ("On remand the Commission must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable."); *id.* at 61a ("[W]e remand for the Commission's additional consideration of this aspect of the Order."); *id.* at 79a ("We remand the numerical limits for

failing to uphold the new rule, the factbound question whether the Commission adequately provided sufficient justifications for its new rules does not warrant further review. The Third Circuit's decision to remand rather than affirm was thus a "misapplication of a properly stated rule of law" that does not warrant the exercise of this Court's certiorari jurisdiction if the case is not otherwise before the Court on the merits. Sup. Ct. R. 10. The Court should deny review in this case and allow the Commission on remand to decide what broadcast ownership rules are appropriate, and to explain why they are justified.

II. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' CONSTITUTIONAL CHALLENGES TO THE FCC'S BROADCAST OWNERSHIP REGULATIONS

A. The FCC's Broadcast Ownership Rules Are Not Subject to Heightened Scrutiny Under the First Amendment

1. The court of appeals applied settled law when it concluded that the FCC's broadcast ownership rules must be upheld under the First Amendment if they are "rationally related to a substantial governmental interest." Pet. App. 47a. It is "well established" that Congress "has power to regulate the use of [broadcast spectrum as] a scarce and valuable national resource," and to "ensure through the regulatory oversight of the FCC that only those who satisfy the 'public interest, convenience, and necessity' are granted a license to use radio and television broadcast frequencies." *FCC* v. *League of Women Voters*, 468 U.S. 364, 376 (1984) (quoting 47 U.S.C. 309(a)). As this Court stated in *NCCB*, "nothing in the First Amendment * * * prevent[s] the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." 436 U.S. at 799. "Denial of a station license" on public interest grounds, "if

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the Commission to support and harmonize its rationale."); *id.* at 102a ("We thus remand for the Commission's additional justification.").

valid under the Act, is not a denial of free speech." *NBC*, 319 U.S. at 227.

There is no basis for Tribune's assertion (04-1036 Pet. 13) that the Third Circuit's decision creates "conflict and uncertainty" regarding the First Amendment analysis applicable to the FCC's ownership regulations. Although Tribune cites (04-1036 Pet. 14) individual judges who have expressed a range of views on the proper First Amendment analysis of broadcast regulation generally, the critical views cited by petitioners were generally directed at *content* regulation, not *ownership* regulations like those at issue here.[8] The courts of appeals that have reviewed the FCC's broadcast ownership regulations uniformly have applied the same, established standard. See *Fox*, 280 F.3d at 1046 ("the deferential review undertaken by the Supreme Court in *NCCB* and *NBC* is also appropriate here"); *Sinclair*, 284 F.3d at 168 ("Sinclair does not have a First Amendment right to hold a broadcast license where it would not [under the Commission's ownership regulations] satisfy the public interest."). There is no conflict in the circuits on the constitutional issues petitioners present.

The Third Circuit held (Pet. App. 46a), and Media General effectively concedes (04-1020 Pet. 25), that petitioners' constitutional contentions are "foreclosed" by this Court's decision in *NCCB*. Petitioners nonetheless contend (04-1020 Pet. 22-23; 04-1036 Pet. 13, 15-16; 04-1045 Pet. 26) that the growth in the number of licensed broadcast stations since *NCCB*, and the development of non-broadcast media outlets, justify overruling *NCCB* and mandating heightened scrutiny of the FCC's ownership regulations under the First Amendment. The Third Circuit correctly rejected that argument and its reliance on changed market condi-

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[8] The only decision of a court of appeals—as opposed to opinions by individual judges—cited by Tribune concerned whether the FCC could engage in "political content regulation" of broadcasting speech, *Telecommunications Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 506 (D.C. Cir. 1986), and the court's discussion focused on that issue.

tions. Pet. App. 47a. As stated in *NCCB* and other decisions of this Court, deference to the FCC's licensing policies arises from the bedrock principle that access to radio frequencies, "unlike other modes of expression, * * * is subject to governmental regulation" because there is a "fixed natural limitation upon the number of stations that can operate without interfering with one another." *NBC*, 319 U.S. at 213, 226. See *NCCB*, 436 U.S. at 799 ("[B]ecause of problems of interference between broadcast signals," only "a finite number of frequencies"—"far exceeded by the number of persons wishing to broadcast"—"can be used productively."); see also *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 637 (1994) ("The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium."). In the Communications Act, Congress addressed those physical limits by exercising federal "control * * * over all the channels of radio transmission," 47 U.S.C. 301, and vesting in the FCC the responsibility for ensuring that access to broadcast spectrum is provided only in accordance with the "public interest." 47 U.S.C. 301, 309(a), 310(d); see also *NBC*, 319 U.S. at 214-215, 226.

As this Court has consistently held, the FCC's lawful exercise of its licensing authority does not violate the constitutional rights of those who are denied broadcast licenses, because the "right of free speech does not include * * * the right to use the facilities of radio without a license." *NBC*, 319 U.S. at 226-227; see *NCCB*, 436 U.S. at 799. Although there are today more broadcast and non-broadcast outlets than there were when the *NCCB* decision was rendered, it remains the case that "many more people would like access to [spectrum] than can be accommodated." Pet. App. 47a; see *Turner*, 512 U.S. at 637 (noting that there are "more would-be broadcasters than frequencies available in the electro-

magnetic spectrum"). The core reason for deferential review of the Commission's licensing policies therefore continues in force.[9]

Of course, as the Commission has found, the modern growth in media outlets is relevant to setting an appropriate limitation on common ownership as a matter of communications policy. For instance, the Commission concluded in this case that the presence of numerous competing media outlets in most markets warranted relaxation of the prior "blanket prophylactic ban on newspaper-broadcast combinations," Pet. App. 432a (Order ¶ 330); see also *id.* at 461a-464a (Order ¶¶ 365-367), and the court of appeals agreed in principle, see Pet. App. 40a-44a. The Commission's new cross-media rule takes account of those marketplace changes by permitting newspaper-broadcast combinations in markets with four or more television stations—markets in which 97% of the U.S. population reside—and eliminating cross-ownership restrictions entirely in large media markets (including the Tampa Bay market highlighted by Media General, see 04-1020 Pet. 5-6). The FCC's decision to ease ownership restrictions, however, does not suggest that deferential judicial review of those restrictions is no longer required.

2. Instead of grappling with this Court's controlling decisions in *NCCB* and *NBC*, petitioners focus their attack on the Court's

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[9] Contrary to Media General's contention (04-1020 Pet. 12-13), this Court's settled analysis of broadcast regulation is entirely consistent with the Court's determination in *Turner* and *Reno* v. *ACLU*, 521 U.S. 844 (1997), not to apply the mode of analysis employed in *NBC* and *NCCB* to regulation of cable television and the Internet. As the Court explained, those other media do not present the same physical scarcity and interference concerns that necessitate governmental licensing of broadcast spectrum. See *Turner*, 512 U.S. at 639 ("given the rapid advances in fiber optics and digital compression technology," cable does not suffer from broadcasting's "inherent limitations," "[n]or is there any danger of physical interference between two cable speakers attempting to share the same channel."); *Reno*, 521 U.S. at 870 (noting that the Internet "can hardly be considered a 'scarce' expressive commodity" because "[i]t provides relatively unlimited, low-cost capacity for communications of all kinds.").

decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). In *Red Lion*, this Court considered whether the FCC's former "fairness doctrine," which required broadcasters to "give adequate coverage to public issues" that "accurately reflects * * * opposing views," violated broadcasters' First Amendment rights. *Id.* at 377. The Court recognized that the fairness doctrine imposed on broadcasters a duty to air views and opinions with which they may not have agreed. *Id.* at 392 (noting that the fairness doctrine prevented broadcasters from "communicat[ing] only their own views on public issues" and "permit[ting] on the air only those with whom they agreed."). The Court concluded, however, that "licensees given the privilege of using scarce radio frequencies" may be required "to share [their] frequenc[ies] with others" and to act as "prox[ies] or fiduciar[ies] with obligations to present those views and voices which are representative of [their] communit[ies]." *Id.* at 389, 394. *Red Lion* remains good law. See, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 237, 241 (2003) (citing *Red Lion*).

Petitioners contend that the FCC's own determination in 1987 that the scarcity of broadcast frequencies no longer justified retention of the fairness doctrine, see *In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990), calls into question the deferential review that courts have traditionally accorded the FCC's broadcast ownership rules. 04-1020 Pet. 19-20; 04-1036 Pet. 16-17; 04-1045 Pet. 26-27 n.17. There is no basis for that view. In repealing its fairness doctrine, the Commission determined that, in light of the development of new media outlets, spectrum scarcity in itself no longer justified the "intrusive type of content-based regulation" that the fairness doctrine imposed on broadcasters' editorial discretion. *Syracuse Peace Council*, 2 F.C.C.R. at 5054 ¶ 76; see *id.* at 5054 ¶ 72, 5068 nn.201-202. The Commission stressed, however, that "technological advancements * * * have not eliminated spectrum scarcity," *id.* at 5055 ¶ 78, and that its

analysis of the constitutionality of the fairness doctrine had no "relevance to the Commission's allocational and licensing function." *Id.* at 5069 n.204. Insofar as any doubt remained, the Commission later "ma[d]e clear that the dicta in *Syracuse Peace Council* regarding the appropriate level of First Amendment scrutiny has been rejected by Congress, this Commission, and the courts." *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 F.C.C.R. 19,973, 19,979 ¶ 17 (2000); see *Radio-Television News Dirs. Ass'n* v. *FCC*, 229 F.3d 269 (D.C. Cir. 2000) (related reference). *Syracuse Peace Council* thus provides no support for petitioners' position. The physical limitations of the broadcast airwaves continue to justify the Communications Act's system for "allocat[ing] broadcast licenses in the 'public interest.'" *NCCB*, 436 U.S. at 795.[10]

Equally unconvincing is petitioners' contention that Congress has sent a "signal" that the FCC's ownership regulations should be subject to a higher level of scrutiny under the First Amendment. See 04-1036 Pet. 16 (quoting *League of Women Voters*, 468 U.S. at 376 n.11); 04-1045 Pet. 26-27 n.17. Congress has not in

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[10] Contrary to Tribune's contention (04-1036 Pet. 15), the Commission's determination that relaxation of the prior newspaper-broadcast cross-ownership prohibition (and its proposed elimination in larger markets) can produce public interest benefits in terms of local news coverage does not affect the constitutional analysis of continued cross-media limits in small- and mid-sized markets. *NCCB* recognized that, in giving effect to the public interest, the Commission must balance the goal of promoting diversity of ownership with the "sometimes conflicting" public interest goal of ensuring "the best practicable service to the public." 436 U.S. at 782 (quoting *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965)). The Communications Act does not require the Commission to give either policy "controlling weight in all circumstances," but leaves that "weighing of policies" under the public interest standard to the Commission's judgment "in the first instance." *Id.* at 810. In this case, the Commission balanced the public interest benefits from broadcaster/newspaper combinations against the significant increases in concentration that can result from such combinations in small to medium size markets. Pet. App. 528a-533a (Order ¶¶ 462-471).

relevant respects amended or repealed the provisions of the Communications Act that confer on the Commission the authority to regulate the distribution of broadcast licenses in the public interest (see pp. 2-3, *supra*), nor has it enacted any statute that directs reviewing courts to apply heightened scrutiny to the FCC's ownership regulations. Petitioners' suggestion of a congressional "signal" is particularly weak with respect to rules restricting cross-ownership of newspapers and broadcast stations: Between 1988 and 1996, Congress prohibited the FCC from making any changes to the former newspaper-broadcast cross-ownership prohibition,[11] and, notwithstanding the fact that Congress in the 1996 Act directed the FCC to modify or reevaluate several of its then-existing media ownership rules, it did not mention that prohibition at all.

3. There is no basis for Media General's argument (04-1020 Pet. 26-30) that, notwithstanding this Court's holding in *NCCB* that newspaper/television cross-ownership regulations "are not content related," 436 U.S. at 801, the broadcast ownership rules should be subject to heightened scrutiny as content-based restrictions on speech. The "principal inquiry in determining content

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[11] See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, 104 Stat. 2136; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 797; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1846; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, 107 Stat. 1166-1167; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies 1995 Appropriations and 1994 Supplemental Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1738.

neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); cf. *Turner*, 512 U.S. at 643 ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."). This Court and lower courts have consistently and correctly regarded the FCC's broadcast ownership regulations as content-neutral, because the regulations do not turn on—and the FCC in applying the regulations does not examine—the content of any message an applicant for a broadcast license may seek to convey. *NCCB*, 436 U.S. at 801; *Fox*, 280 F.3d at 1046 (ownership regulations are "structur[al]," not "content-based"); see *NBC*, 319 U.S. at 226.

B. The Cross-Media Rule Does Not Violate The Due Process or Equal Protection Principles of the Fifth Amendment

Petitioners contend (04-1020 Pet. 23-25; 04-1036 Pet. 19-24) that the cross-media rule violates due process and equal protection principles because it limits cross-media combinations among daily newspapers, television stations, and radio stations, but not cable systems, Internet websites, and other information-delivery technologies. It is well established, however, that "the fact that a law singles out a certain medium" for different treatment does not by itself establish a constitutional concern. *Turner*, 512 U.S. at 660 (citing *Leathers* v. *Medlock*, 499 U.S. 439 (1991)). Such distinctions are permitted where "'justified by some special characteristic of' the particular medium being regulated." *Turner*, 512 U.S. at 660-661 (quoting *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Rev.*, 460 U.S. 575, 585 (1983)).

Because daily newspapers, television stations, and radio stations are the "three media platforms that Americans turn to most often for local news and information," Pet. App. 520a (Order ¶ 452), the public interest goal of promoting diversity of ownership and viewpoint is more affected by consolidation among

broadcast stations and newspapers than by combinations involving other types of media. Focusing the cross-media rule on those media protects diversity while avoiding unnecessary regulation of other industries. Cf. *Turner*, 512 U.S. at 661 (given that non-cable video delivery systems do not present the "bottleneck" control or threat to the survival of broadcast television stations posed by cable systems, "[i]t should come as no surprise * * * that Congress decided to impose the must-carry obligation upon cable operators only").

There is no basis for Tribune's assertion (04-1036 Pet. 22-23) that the Third Circuit's equal protection holding conflicts with decisions of other courts of appeals. The Fourth and Ninth Circuit decisions that Tribune cites were both vacated by this Court, see 516 U.S. 415, 1155-1156 (1996), and, in any event, both of those circuits agreed with the Third Circuit's conclusion below that *NCCB* controlled the constitutional analysis of newspaper-broadcast cross-ownership restrictions. See *Chesapeake & Potomac Tel. Co.* v. *United States*, 42 F.3d 181, 191-192 (4th Cir. 1994); *U.S. West* v. *United States*, 48 F.3d 1092, 1098 (9th Cir. 1994). In *News American Pub'g, Inc.* v. *FCC*, 844 F.2d 800, 812 (D.C. Cir. 1988), it was critical to the court's analysis that the challenged prohibition was "structural only in form, as it applies to a closed class of one publisher broadcaster."

Petitioners' contention (04-1020 Pet. 24; 04-1036 Pet. 20-21) that the FCC was constitutionally required to apply the cross-media rule to cable systems and Internet websites ignores the particular characteristics of those media and the limitations of the record before the Commission. As the Commission explained below, its analysis of diversity focused on likely sources of *local* news and public affairs programming. Pet. App. 489a-490a (Order ¶ 406). The Commission did not treat cable systems or networks as a significant contributor to viewpoint diversity, because there was insufficient reliable record evidence on the extent to which consumers rely on cable television for such programming.

Id. at 494a-495a (Order ¶ 414). See *NCCB*, 436 U.S. at 815 (upholding divestiture of newspaper-broadcast combinations in small markets on the basis that other forms of media did not make similar contributions to viewpoint diversity in local markets). With respect to the Internet, it would have made little sense to apply the cross-media rule to that medium; although the Commission originally concluded (in findings set aside below) that the Internet contributes to diversity in local markets, the Internet is not itself "owned"—or otherwise controlled—by any single party, and the multiplicity of Internet outlets would make it virtually impossible to develop a meaningful or workable cross-ownership rule in that context.

III. SECTION 202(h) DOES NOT IMPAIR THE COMMISSION'S AUTHORITY TO ADOPT AND REVISE ITS OWNERSHIP RULES

1. The Third Circuit correctly rejected NAB's argument (see 04-1033 Pet. 19-25) that the FCC's decision to revise the definition of radio markets and to count Joint Sales Agreements as broadcast interests violated the 1996 Act because those changes had the effect of making the local radio ownership rule more restrictive. Pet. App. 34a; see *id.* at 124a n.98 (Scirica, J., dissenting). The FCC's broad powers under the Communications Act to advance the public interest have traditionally included the power to impose additional restrictions on media ownership. See *NCCB*, 436 U.S. at 780-781. As the court of appeals correctly observed, "Congress gave no express indication [in the 1996 Act] that it intended to restrict the Commission's rulemaking authority" to adopt such restrictions where supported by the agency record. Pet. App. 34a n.18 (citing *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 613 (1991) ("[I]f Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted[,] * * * we would have expected it to do so in language expressly describing an exception [to that authority]."); see *id.* at 124a (Scirica, C.J.,

dissenting) (stating that the 1996 Act "does not foreclose the possibility of increased regulation under the biennial review if the Commission finds such action in the public interest").

Contrary to the contentions of NAB and Clear Channel (04-1033 Pet. 20-21; Clear Channel Br. 21), Congress's decision to set the permissible levels of common ownership in Section 202(a) of the 1996 Act does not constrain the FCC's authority to regulate broadcast ownership in the public interest. See Pet. App. 34a. Indeed, Section 202(h) of the same statute expressly directs the FCC to determine whether to "repeal *or modify*" ownership rules that may no longer promote the public interest. 110 Stat. 112 (emphasis added). As the court of appeals recognized (Pet. App. 34a), Congress's use of the term "modify," in conjunction with the continued emphasis on the "public interest" in Section 202(h), refutes the argument that Congress intended through Section 202(a) to effectuate a drastic reduction in the scope of the FCC's traditional licensing authority. Rather, the 1996 Act's congressionally specified revisions to the Commission's rules—including those to the radio ownership rules—"determined only the starting point from which the Commission was to assess the need for further change." *Fox*, 280 F.3d at 1043.

2. Contrary to petitioners' suggestion (04-1033 Pet. 24, 29; 04-1036 Pet. 25; 04-1045 Pet. 19-20; see Clear Channel Br. 24-26), the Third Circuit's interpretation of Section 202(h) in this case does not conflict with the D.C. Circuit's decisions in *Fox* and *Sinclair*. In *Fox*, the D.C. Circuit interpreted Section 202(h) to require the Commission, if it decides to retain a particular ownership rule, to provide an adequate explanation for its decision. See 280 F.3d at 1042, 1044. Likewise, the court in *Sinclair* concluded that the Commission "has wide discretion to determine where to draw administrative lines," 284 F.3d at 162 (internal quotation marks omitted), but that the Commission must "provide a reasoned explanation for its action," *ibid.* In stating that the Commission's decision to retain, modify, or repeal an ownership rule must

be supported by a "reasoned analysis," the Third Circuit articulated essentially the same standard in this case. See Pet. App. 34a-36a. And as the Third Circuit recognized, the D.C. Circuit has now made clear that Congress's direction that the Commission retain only those rules that are "necessary in the public interest" means only that a retained rule must be useful in serving the public interest. Pet. App. 30a-33a (discussing *Cellco P'ship* v. *FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004)).[12]

IV. THE CONDITIONAL CROSS-PETITION IN NO. 04-1177 SHOULD BE DENIED

For the most part, Sinclair's cross-petition in No. 04-1177 reiterates arguments that are presented in the petitions filed in Nos. 04-1033, 04-1036, and 04-1045.[13] Although none of those arguments merits this Court's review, if the Court decides to address them, it may do so by granting one or more of the petitions in this case. There is no reason—and Sinclair offers none—why the Court should also grant a duplicative conditional cross-

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[12] Tribune's suggestion (04-1036 Pet. 25) that Section 202(h) eliminated the Third Circuit's authority to stay the revised rules is without merit. A court retains the authority to grant or withhold equitable remedies "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Section 202(h) does not contain any such restriction on the equitable authority of the courts.

[13] There is no basis for Sinclair's contention (04-1177 Cross-Pet. 9) that the Third Circuit's decision in this case "overrule[s]" the D.C. Circuit's decision in *Sinclair*. The *Sinclair* court concluded that the FCC had not provided an adequate explanation for limiting "voices" under the local television rule to television broadcasters. The Third Circuit below reviewed a different version of the local television rule in which the number of voices is no longer a factor and, therefore, did not consider the types of media that should count as "voices" under that rule.

petition that does not substantively add to the petitions already before the Court.

Nor should the Court entertain Sinclair's argument (04-1177 Cross-Pet. 14-16) that the local television ownership rule unconstitutionally "singles out" television broadcasters—an argument that is not otherwise presented in the petitions before the Court. The question whether television broadcasters have been singled out in violation of the First Amendment was not presented to the court of appeals by any party. Consequently, there is no decision of the court of appeals on that issue for this Court to review. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted).

Sinclair's argument that the local television ownership rule violates the First Amendment is in any event without merit. A regulation may "single[] out a certain medium" without violating the First Amendment if the regulation is "justified by some special characteristic of the particular medium being regulated." *Turner*, 512 U.S. at 660-661 (internal quotation marks omitted). Although, as Sinclair notes (04-1177 Cross-Pet. 15), the FCC concluded that viewers generally consider television broadcasting and cable networks to be "good alternatives for one another" in the market for delivered video programming (Pet. App. 298a-299a (Order ¶ 143)), it also found that, because cable networks typically offer programming on a nationwide basis, they "may respond differently [from television stations] to changes in local market concentration." *Id.* at 299a (Order ¶ 145). The FCC thus reasonably concluded that it should "focus on ownership of television broadcast stations, not cable networks, to promote competition in local television markets." *Id.* at 300a.

CONCLUSION

The petitions and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177

In the Supreme Court of the United States

MEDIA GENERAL, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Respondents*

ON PETITIONS AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should overrule its long-settled holdings in *Red Lion Broadcasting v. FCC* and *FCC v. National Citizens Committee for Broadcasting* that broadcast regulations receive rational basis review under the First Amendment, that newspaper-broadcast cross-ownership regulations do not impermissibly discriminate in violation of the First or Fifth Amendment, and that newspaper-broadcast cross-ownership regulations are content-neutral.

2. Whether the court of appeals' interpretation of §202(h) of the 1996 Telecommunications Act accords with the decisions of the only other court of appeals to have considered the issue.

3. Whether the court of appeals properly remanded for justification or modification certain aspects of the Federal Communications Commission's 2002 Biennial Regulatory Review Order that were not supported by the record or that lacked reasoned analysis.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Public Interest Respondents state as follows:

Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and National Council of the Churches of Christ in the United States have no parent companies or publicly-issued stock.

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STATEMENT

Public Interest Respondents[1] generally adopt the statement of the United States in this case, and write separately to underscore two additional points.

1. The court of appeals upheld much of the FCC's 2002 Biennial Regulatory Review Order ("*2002 Biennial*"). Pet. App. 1a-190a.[2] The court's comprehensive opinion properly notes that the scope of judicial review of federal agency action is "narrow" and that it is only authorized to remand an agency decision when "it is not supported by substantial evidence, or the agency has made a clear error in judgment." *Id.* at 25a (internal citations omitted). For example, the court upheld the FCC's decisions to relax its cross-ownership ban, *id.* at 40a, to retain the "top four" restriction on ownership of local television stations, *id.* at 72a, to revise its definition of local radio markets, *id.* at 85a, and to count "joint sales agreements" toward a radio station's permissible ownership total, *id.* at 96a.

2. The court of appeals was unanimous in its disposition of many key arguments raised by Petitioners and Cross-

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[1] Public Interest Respondents are Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and the National Council of the Churches of Christ in the United States.

[2] References are to the appendix filed by Petitioner in 04-1020.

Petitioners. The court unanimously rejected all of the constitutional challenges raised by Petitioners. *See* Pet. App. 107a. Chief Judge Scirica agreed with the majority on the proper legal standards for review of agency decisions, *compare id.* at 24a-26a, *with id.* at 116a-118a, but came to a different conclusion as to the application of those standards to certain specific rules.

REASONS TO DENY THE WRIT

Review by this Court would be premature. The court of appeals neither forbade nor compelled the implementation of specific rules; it simply remanded those rules that were without factual record support or rational agency explanation. Because many rules challenged by Petitioners are not expected to be retained on remand, review of those rules would likely be unnecessary. Further, all of the rules at issue in this case may be modified or repealed by the FCC during the next congressionally-mandated review of media ownership rules, which the FCC will conduct in 2006. This Court should not expend its scarce judicial resources to pass on specific rules that may be repealed or modified by the time its decision is issued.

More importantly, despite the voluminous record below, the proceeding did not focus on the core issue raised by many Petitioners—whether spectrum scarcity continues to exist. Accordingly, even assuming this Court should wish to revisit this fact-dependent question, this case would be a poor vehicle through which to do so.

Nor does this case present any broad, unsettled issues of law for this Court to review. The court below did not announce any new principle of constitutional law; it simply applied doctrine that has been clearly established by this Court. Petitioners present no valid reason for this Court to overrule this precedent. Further, the Third Circuit's interpretation of the relevant statute's standard of review provision is in com-

plete harmony with the explanation of the only other court of appeals to have considered it.

Stripped of its constitutional and statutory rhetoric, this case is simply about the application of properly articulated administrative law principles to a complex factual record. Such case-specific issues do not warrant this Court's intervention. Sup. Ct. R. 10.

I. PETITIONERS HAVE NOT DEMONSTRATED ANY COMPELLING REASON TO OVERRULE LONGSTANDING PRECEDENT

The appropriate standard of review for assessing the constitutionality of the FCC's broadcast ownership rules was decided by this Court in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"). The court of appeals properly applied the standards established in *NCCB* to this case. Essentially conceding this point, three Petitioners nonetheless urge this Court to reconsider and overrule *NCCB*.

In *NCCB*, newspaper and broadcast station owners challenged the FCC's then recently adopted newspaper-broadcast cross-ownership rule, which was much more restrictive than the rules at issue in this case. The Court rejected the argument that the cross-ownership rule violated the First Amendment, finding that the argument "ignore[d] the fundamental proposition that there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" 436 U.S. at 799 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969)). The Court observed that the "physical limitations of the broadcast spectrum are well known" and that the number of frequencies used for broadcasting "is far exceeded by the number of persons wishing to broadcast to the public." 436 U.S. at 799.

This Court has repeatedly emphasized that the reconsideration of previous decisions should be approached with the utmost caution. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Indeed, just last term, this Court explicitly relied on *Red Lion* in upholding an important provision of the Bipartisan Campaign Reform Act of 2002. *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 237 (2003). Because, as shown below, Petitioners present no compelling reason for this Court to reconsider its prior decisions, the Court should deny certiorari.

A. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Holding That Rational Basis Is The Appropriate Standard For Review Of Broadcast Regulations

As far back as 1943, this Court rejected a constitutional challenge brought by the broadcast networks against an FCC ownership rule known as the "chain broadcasting rule." The Court recognized that "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 226 (1943). Subsequently, in *Red Lion*, the Court explained that "in view of the limited number of available broadcasting frequencies," it did not violate the First Amendment for the FCC to require broadcasters to serve the public interest by providing certain types of programming. 395 U.S. at 394 (internal quotations omitted).

1. Neither Congress Nor The FCC Have Signaled That This Court Should Reconsider Its Approach to Broadcast Regulation

In *FCC v. League of Women Voters of California*, the Court concluded that "[w]e are not prepared . . . to reconsider our longstanding approach [of *Red Lion*] without some signal

from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. 364, 376 n.11 (1984). This signal has not been given.

a. In this very proceeding, the FCC reaffirmed its support for the scarcity doctrine. Responding to arguments made by two of the present Petitioners, the FCC stated:

> We disagree with Media General and Tribune, who argue that our ownership rules affecting newspapers should be judged under strict scrutiny First Amendment analysis. Media General and Tribune claim that spectrum scarcity is no longer a valid rationale for media ownership limits . . . . [T]he courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation made by commenters here. Accordingly, the rational basis test continues to apply to our ownership rules.

Pet. App. 218a (*2002 Biennial* ¶15). As this makes evident, the FCC is clearly not "signaling" this Court to reconsider the scarcity doctrine.

b. Nor has Congress indicated a desire for the Court to reconsider the scarcity doctrine. To the contrary, Congress has enacted numerous laws imposing public interest requirements premised on the continued existence of scarcity, and in some cases, reinforcing that scarcity.

For example, in the Children's Television Act of 1990, Congress explicitly found that as part of television stations' obligations to serve the public interest, stations should provide programming serving the special needs of children. Congress therefore directed the FCC to consider in renewing television licenses the extent to which the licensee has served the educational and informational needs of children. Chil-

dren's Television Act of 1990, Pub. L. No. 101-437, §§ 101(2), 103(a), 104 Stat. 996, *codified in part at* 47 U.S.C. § 303(a). *See also* H.R. Rep. No. 101-385 at 8 (citing *Red Lion* and rejecting suggestions of constitutional difficulties with Act).

In 1996, Congress added a new section to the Communications Act to establish a framework for the transition from analog to digital television. Telecommunications Act of 1996, Pub. L. No. 104-104, § 201(a), 110 Stat. 56 (1996), *codified at* 47 U.S.C. § 336 ("1996 Act"). Although this transition offered the opportunity for awarding additional broadcast licenses, Congress opted instead to limit eligibility for digital television licenses to the existing licensees. 47 U.S.C. § 336(a)(1). At the same time, Congress reaffirmed that television licensees were expected to continue to meet their obligation to serve the public interest. *Id.* at § 336(d). Thus, if anything, the 1996 Act actually increased scarcity by declining to make this spectrum available to new licensees.[3]

In 1997, Congress directed that the FCC utilize auctions to award all new commercial broadcast licenses, shifting away from a "comparative hearing" process whereby the FCC evaluated each applicant before awarding a license. Balanced Budget Act, Pub. L. No. 105-33, § 3301, 111 Stat. 251 (1997). This action was intended to address the inefficiencies of the hearing process that stemmed from the growing number of applications for new broadcast licenses. H.R. Rep. No. 105-149 at 558; *see also* Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 Hastings Comm. & Ent. L.J. 359, 439 (2003). In-

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[3] Tribune claims that Congress' requirement that the FCC redistribute spectrum after the digital television transition is complete demonstrates that it no longer believes the spectrum is scarce. 04-1036 Pet. 17. In fact, this leads to the opposite conclusion—if there were not more would-be users than available frequencies, Congress would have no reason to re-apportion the spectrum.

deed, the Balanced Budget Act relied upon spectrum scarcity in requiring that minimum amounts be raised by each auction. H.R. Rep. No. 105-149 at 569-72 (setting minimum amounts "[i]n recognition of the scarcity (and hence, the value) of spectrum"). Both the use of auctions and the high prices they generate[4] demonstrate that there continue to be far more would-be broadcasters than can be accommodated by the broadcast spectrum.

In 2000, Congress actually rolled back an FCC attempt to award additional broadcast licenses through the creation of a new, noncommercial low power FM radio service. A provision in the Department of Commerce and Related Agencies Appropriations Act of 2001 limited the number of low-power radio applications that the FCC could grant, due to concerns that allowing more radio stations on the air would interfere with existing broadcast stations. H.R. 5548 § 632, *enacted by* H.R. 4942, Pub. L. No. 106-553, 114 Stat. 2762 (2000).

And finally, in early 2004, Congress passed legislation rolling back the FCC's relaxation of the national television audience limits. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004). As part of the *2002 Biennial*, the FCC increased the percentage of the national television audience that one company could "reach" from 35% to 45%. Congress overruled the FCC's decision

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[4] For example, the FCC's first ever open auction of the FM broadcast spectrum saw over 450 bidders participate, and resulted in 110 winning bidders paying nearly $150 million for a portion of the spectrum. News Release, FCC Announces Close to Unprecedented FM Auction (Nov. 24, 2004). The FCC noted that this auction "signifie[d] the continuing strong demand for radio broadcast spectrum." *Id.* In another example, eleven bidders vied for a single television station license in Blanco, TX; the winning bid approached $19 million. Public Notice, Blanco, Texas Broadcast Auction No. 80 Closes (July 18, 2000). One reason for the high prices generated by spectrum auctions is that "very few 'new' broadcast licenses are issued these days," a fact that is "the consequence of spectrum scarcity." Manheim & Solum, *supra*, at 441.

and rolled the cap back to 39%. If Congress did not believe that the spectrum was "scarce," it would have no reason to cap permissible ownership. As the D.C. Circuit explained, "[i]n the face of [the limited capacity of the spectrum], the national ownership cap increases the number of different voices heard in the nation . . . . But for the scarcity rationale, that increase would be of no moment." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046, *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

2. Spectrum Scarcity Continues To Exist As A Matter Of Fact

Various Petitioners nonetheless argue that this Court should reconsider *NCCB* and *Red Lion* because the factual predicate of the scarcity doctrine has been eroded by the development of cable television, direct broadcast satellites, and the internet. 04-1020 Pet. 10-11, 04-1036 Pet. 16, 04-1045 Pet. 26. But, as the court of appeals correctly recognized, "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." Pet. App. 47a. Nor is there any conflict among the Circuits on this point. The D.C. Circuit recently rejected the same argument, noting that the "protest that *NCCB* [and the scarcity doctrine] is no longer controlling because it is undermined by the advent of cable television, DBS, and the internet, is to no avail." *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 168-69 (D.C. Cir. 2002) (internal quotations and citations omitted); *see also American Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1169 (D.C. Cir. 2004) (noting that the number of frequencies that can be productively used "is far exceeded by the number of persons wishing to broadcast").

Further evidence that there continue to be more would-be broadcasters than frequencies available for licensing is demonstrated by the large number of unlicensed broadcast stations that have been shut down by the FCC in recent

years.[5] Likewise, Media General's contention (04-1020 Pet. 12-13) that the scarcity doctrine has been undermined because this Court has not extended the doctrine to cable or internet regulations misses the point. As the *Red Lion*'s scarcity doctrine is based on the unique physical characteristics of the broadcast spectrum, the fact that the doctrine has not been extended beyond the broadcast arena in no way undercuts its viability in the broadcast arena. Spectrum scarcity exists today in the same form that it did when this Court first recognized the doctrine more than a half-century ago.[6] Further review of this factual question, which was not addressed by the FCC or the court of appeals and barely raised in the huge administrative record, is unwarranted.

3. There Is No Conflict Among The Circuits Regarding The Scarcity Doctrine

Contrary to many Petitioners' contentions, there is no conflicting authority among the courts of appeals regarding the scarcity doctrine or the appropriate level of scrutiny for broadcast regulations. Every Circuit has recognized that broadcasting regulation is subject to more deferential review

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[5] *See, e.g., Ruggiero v. FCC*, 317 F.3d 239, 242 (D.C. Cir. 2003); *Grid Radio v. FCC*, 278 F.3d 1314, 1316 (D.C. Cir. 2002); *Prayze FM v. FCC*, 214 F.3d 245, 250 (2d Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 218 F.3d 543, 549-50 (6th Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 459 (8th Cir. 2000); *United States v. Dunifer*, 219 F.3d 1004, 1005 (9th Cir. 2000); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam).

[6] Media General claims (04-1020 Pet. 22) that because modern technology has increased the amount of spectrum available for use, scarcity no longer exists. This is not the case. *Red Lion*'s observation that "[a]dvances in technology . . . have led to more efficient utilization of the frequency spectrum, but uses for the spectrum have also grown apace," 395 U.S. at 396-97, remains true today with the tremendous growth in cellular telephone service and other wireless services.

under the First Amendment due to the fact that more people wish to broadcast than the spectrum can accommodate.[7]

Tribune contends (04-1036 Pet. 13) that the Third Circuit's suggestion that it would endorse the scarcity doctrine "[e]ven were [it] not constrained by Supreme Court precedent," Pet. App. 47a, somehow creates a conflict with the D.C. Circuit. This is not so. While comments critical of the scarcity doctrine have sometimes appeared in dissenting or concurring opinions of the D.C. Circuit, *see, e.g.*, *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (dissent from denial of rehearing en banc); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) ("*ACT*") (Edwards, C.J., dissenting); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 682-83 (D.C. Cir. 1989) (Starr, J., concurring), such comments are dicta, and conflicts involving dicta do not merit certiorari. *See, e.g.*, *Bunting v. Mellen*, 541 U.S. 1019, 124 S.Ct. 1750, 1754 (2004). Recognizing that *Red Lion* continues to "rule the

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[7] For example, the D.C. Circuit recently reviewed the FCC's system for awarding non-commercial educational broadcast licenses and held that the scheme was subject to deferential review under the First Amendment. It concluded that "[r]egulation of some form is an irreducible feature of any broadcast spectrum worth having, since 'a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public.'" *American Family Ass'n*, 365 F.3d at 1169 (quoting *NCCB*, 436 U.S. at 798). *See also Mark v. FCC*, 468 F.2d 266, 269 (1st Cir. 1972); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam); *Adventure Communications, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 439-40 (4th Cir 1999); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1039, 1043 (5th Cir. 1982); *United States v. Szoka*, 260 F.3d 516, 526 (6th Cir. 2001); *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 (7th Cir. 1989); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968); *Scott v. Rosenberg*, 702 F.2d 1263, 1272 (9th Cir.1983); *Cmty. Communications Co., Inc. v. City of Boulder, Colo.*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981); *In re Beach Television Partners*, 38 F.3d 535, 536 (11th Cir. 1994).

broadcast jungle," *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1988), the D.C. Circuit has consistently and properly applied the scarcity doctrine. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1168; *Radio-Television News Dir. Ass'n v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) ("*RTNDA*"); *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 509 (D.C. Cir. 1986) ("*TRAC*"). Thus there is simply no conflict for this Court to review.

B. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Equal Protection Holding

Certain Petitioners also challenge the court of appeals' decision that rules barring newspapers from owning broadcast stations do not impermissibly discriminate in violation of the First or Fifth Amendment. As with the scarcity doctrine, this Court has already addressed this issue. In *NCCB*, the Court upheld a ban on newspaper-broadcast cross-ownership against an equal protection challenge, finding the regulations to be a "reasonable means" of promoting the FCC's objectives. 436 U.S. at 801-02. Indeed, even Media General acknowledges (04-1020 Pet. 24) that the *NCCB* Court rejected the argument that the cross-ownership regulations unfairly single out newspaper owners.

1. Nonetheless, Media General and Tribune argue that this Court should reconsider *NCCB* because "in *NCCB's* day, the only other 'major media of mass communications' besides newspapers were broadcast television and radio," while today other forms of mass media such as cable and internet are available. 04-1020 Pet. 24; *see also* 04-1036 Pet. 20. This misreads *NCCB*. The cross-ownership rule at issue in *NCCB* was not intended to diversify all major media of mass communication; rather, the FCC sought to regulate media cross-ownership to promote diversity of viewpoints within local communities. 436 U.S. at 786 (citing *Rules Relating to Multiple Ownership of Standard, FM, and Television Broad-*

cast Stations, Second Report & Order, 50 F.C.C.2d 1046, 1075 (1975) ("*1975 Order*")). The FCC excluded certain types of mass media, such as magazines and other periodicals that "dealt exclusively with regional or national issues and ignored local issues." *1975 Order*, 50 F.C.C.2d at 1080 ¶112; *see also NCCB*, 436 U.S. at 787 n.10. Thus, in 1975, the FCC recognized that other major mass media existed, but chose to restrict common ownership of only those media that covered local issues—specifically newspapers, broadcast television, and broadcast radio.

Similarly, in the *2002 Biennial,* the FCC sought to "preserv[e] viewpoint diversity among local, not national, news sources." Pet. App. 484a-485a (*2002 Biennial* ¶399). Thus, the FCC excluded "the large number of *national* news sources such as all-news cable channels and the news sources on the Internet." *Id.* (emphasis added). Finding that "broadcast television, daily newspapers, and broadcast radio" continue to be "the three media platforms that Americans turn to most often for local news and information," *id.* at 520a (*2002 Biennial* ¶452), the FCC appropriately limited the cross-media limits to the media that are the most significant sources of local news.

Petitioners Newspaper Association of America, Belo Corp., Gannett Co., Inc., and Morris Communications Company, LLC ("NAA") (04-1045 Pet. 27), along with Media General (04-1020 Pet. 25), also claim that the specific cross-ownership regulations adopted in the *2002 Biennial* violate *NCCB*'s equal protection holding because they treat newspaper owners somewhat differently than radio and television station owners. Again, these Petitioners misread *NCCB*. *NCCB* merely required the cross-ownership regulations reviewed below to treat newspaper and broadcast owners "in *essentially* the same fashion." 436 U.S. at 801 (emphasis added). As with the rules at issue in *NCCB*, the cross-ownership regulations treat newspaper and broadcast owners

essentially the same way in that all are restricted in their ability to own another type of local media. *See* Pet. App. 452a. Moreover, contrary to Media General's absolute statement that "a cable company may buy a broadcast station even where a newspaper may not," 04-1020 Pet. 24, a newspaper owner may receive a waiver of the rule to co-own a broadcast station in certain circumstances. Pet. App. 437a (*2002 Biennial* ¶481).

2. The court of appeals' decision not to apply heightened scrutiny to the cross-ownership regulations does not conflict with any decision of this Court. The *NCCB* Court did not apply heightened scrutiny in its disposal of the equal protection challenges, but rather found that content-neutral regulations that prevent any person from owning both a newspaper and a broadcast station are a "*reasonable means* of promoting the public interest in diversified mass communications." 436 U.S. at 802 (emphasis added).

Moreover, *NCCB*'s use of rational basis review is fully consistent with this Court's recent jurisprudence. Tribune and Cross-Petitioner Sinclair Broadcast Group, Inc. ("Sinclair") rely (04-1036 Pet. 21-22, 04-1177 Pet. 15) on *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") to argue that *any* regulation that distinguishes between classes of media outlets demands heightened scrutiny. However, this argument is directly precluded by *Turner I*'s admonition that "[i]t would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." 512 U.S. at 660. *Turner I*'s touchstone for determining the level of scrutiny is the type of medium; "heightened scrutiny is unwarranted when the differential treatment is justified by some special characteristic of the particular medium being regulated." *Id.* at 660-61 (internal citations omitted). As the cross-ownership restrictions apply

to broadcast media, the "special characteristic" of spectrum scarcity makes heightened scrutiny unwarranted.

The other cases relied upon by Tribune (04-1036 Pet. 21-23; *see also* 04-1177 Cross-Pet. 15) are inapposite to the question of the proper standard of review of content-neutral broadcast regulations. *League of Women Voters* applied heightened scrutiny because the statute in question was a *content-based* speech restriction. 468 U.S. at 383.[8] *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), considered the constitutionality of a tax imposed only on newspapers, and is directly analogous to *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), which the *NCCB* Court held not to be controlling on the question of cross-ownership regulations, 436 U.S. at 801. Finally, the two court of appeals decisions cited by Tribune (04-1036 Pet. 22-23) concerned regulation of telephone companies, and both cases expressly recognized that broadcast ownership regulations receive a different and lower level of constitutional scrutiny.[9]

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[8] *See also Fox Television Stations*, 280 F.3d at 1046 (rejecting heightened scrutiny because the rule at issue, "unlike the [rule] at issue in *League of Women Voters*, is not a content-based regulation; it is a regulation of industry structure, like the newspaper/broadcast cross-ownership rule the Court concluded was content-neutral in *NCCB*").

[9] Further, both cases were vacated by this Court. *US West, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 191 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996) (per curiam).

C. The Court Below Did Not Address Whether Cross-Ownership Regulations Are Content-Based; Nor Have Petitioners Presented Compelling Reason To Revisit *NCCB*'s Holding That Such Regulations Are Content-Neutral

Media General's and Tribune's contention (04-1020 Pet. 26; 04-1036 Pet. 23) that the cross-ownership regulations should have been subjected to heightened scrutiny because they are content-based restrictions on speech likewise provides no basis for reconsidering *NCCB*. As a threshold matter, review of this argument is inappropriate because it was not addressed in the decision below. This Court "do[es] not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

Certiorari is also unnecessary because this Court has already addressed the question, specifically holding that newspaper-broadcast cross-ownership regulations "are not content related." *NCCB*, 436 U.S. at 801. Lower courts have properly followed that decision, recognizing that cross-ownership rules are simply structural regulations that receive minimal constitutional scrutiny. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1169; *Ruggiero*, 317 F.3d at 244.

In any event, the court of appeals' decision that the structural cross-ownership regulations are not content-based is correct. As this Court has explained, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The cross-ownership regulations were not at all motivated by the message of the speaker, but rather were developed to ensure a diversity of media voices was available to the public. Pet. App. 481a-482a (*2002 Biennial* ¶¶393-94). "[B]y placing a value upon diversity the FCC did not necessarily . . . value one speaker, or one type of speech over another; it merely

expressed its intention that there continue to be multiple speakers." *American Family Ass'n*, 365 F.3d at 1169 (internal quotations omitted).

The D.C. Circuit has held that analogous regulations of the structure of cable ownership that were motivated by diversity concerns were not content-based. In *Time Warner Entertainment Co. v. United States*, the court noted that "[a]s the Supreme Court made quite clear in *Turner I*, . . . making way for some speakers" in a context like broadcasting "where that necessarily means limiting the speech of others, is not inherently content-based." 211 F.3d 1313, 1317 (D.C. Cir. 2000). This same, traditional rationale clearly applies to the present regulations—rules restricting broadcast ownership to promote a diversity of media outlets are not subject to heightened First Amendment scrutiny.

D. Should The Court Wish To Reconsider Its Constitutional Precedent, Other Cases Offer A Better Opportunity For Fully Assessing The Issues

The *2002 Biennial* focused on specific ownership rules and not the factual underpinnings of the scarcity doctrine. Any reference to the continued existence of spectrum scarcity was an inconsequential piece of a massive record, and the factual basis for doctrine was not addressed on the merits by the FCC or the court of appeals. Re-examination of the scarcity doctrine would be a fact-intensive process. The present case plainly does not afford this Court a sufficient record or factual basis for such a task.

Moreover, as a practical matter, this case does not present an actual cross-ownership rule for constitutional review. Because the court below agreed with the FCC that the original newspaper-broadcast cross-ownership rule was no longer necessary, *see* Pet. App. 40a, there is no need to re-evaluate the constitutionality of that rule. On the other hand, since the court found that the replacement rule adopted by the FCC

was arbitrary and capricious and subject to further proceedings on remand, it would make no sense to evaluate the constitutionality of that rule at this time.

Further, the FCC has before it at least three licensing cases that squarely present the issue of whether the cross-ownership prohibition is constitutional. Specifically, Media General has filed license renewal applications asking the FCC to waive the newspaper-broadcast cross-ownership rule to allow it to continue to own both a daily newspaper and a television station in the Myrtle Beach-Florence, South Carolina, Panama City, Florida, and Columbus, Georgia DMAs.[10] In making its waiver requests, Media General argues that spectrum scarcity no longer exists and thus the cross-ownership rules are unconstitutional. *See, e.g.* Application for Renewal of Broadcast Station License for WBTW, Media General Opposition to Petition to Deny 39-44 (Dec. 14, 2004). Because these cases present the issue in specific, concrete factual settings, yet do not raise the wide variety of issues presented in the *2002 Biennial*, any one would present a better vehicle for revisiting the constitutional issues raised by Petitioners in this case, should this Court be inclined to do so.

II. THERE IS NO CONFLICT OVER THE INTERPRETATION OF §202(h) OF THE 1996 TELECOMMUNICATIONS ACT

Petitioner National Association of Broadcasters ("NAB"), along with Tribune, NAA, and Respondent Clear Channel Communications, Inc. ("Clear Channel")[11] assert there is a

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[10] Application for Renewal of Broadcast Station License for WBTW, FCC File No. BRCT-20040802BIK (Aug. 6, 2004), Application for Renewal of Broadcast Station License for WMBB, FCC File No. BRCT-20041001AQF (Oct. 7, 2004), Application for Renewal of Broadcast Station License for WRBL, FCC File No. BRCT-20041210BZP (Dec. 8, 2004).

[11] Clear Channel is a Respondent in 04-1033.

circuit split with respect to the FCC's construction of §202(h) of the 1996 Act. This is not so. All three members of the panel agreed that the court of appeals' construction is consistent with that of the D.C. Circuit. Their ruling that the periodic review mandated by §202(h) should employ the normal arbitrary and capricious test generally required by the Administrative Procedure Act is clearly correct and should not be disturbed. Nor is there reason for this Court to examine the court of appeals' unanimous conclusion that §202(h) allows the FCC to adopt stronger rules at the conclusion of the review process.

Although each of the petitioners emphasize the deregulatory thrust of the 1996 Act, there is no suggestion that the ruling below conflicts with any other circuit on this point. *See* Pet. App. 34a (majority noting that 1996 Act is deregulatory); Pet. App 122a (concurring judge noting the "deregulatory flavor" of the 1996 Act). Nor do any of the Petitioners point to express language in any statute that prohibits the FCC from increasing its regulatory oversight when the record justifies such action. Under this Court's jurisprudence, the FCC is entitled to deference in construction of statutory ambiguities such as this, *see, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), and the petitions surely do not raise an issue here that would support issuance of a writ of certiorari.

1. Tribune, NAA, Sinclair, and Clear Channel argue that the Third Circuit's holding that §202(h) does not impose a more exacting standard of review is in conflict with that of the D.C. Circuit. *See* 04-1036 Pet. 24-26; 04-1045 Pet. 19-23; 04-1177 Cross-Pet. 11-12; Clear Channel Br. 24-27. These arguments mischaracterize the sequence in which the FCC and the D.C. Circuit acted and downplay the D.C. Circuit's definitive decision in *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004). As the Third Circuit joined *Cellco*

in holding that the phrase "necessary in the public interest" [12] did not create a deregulatory presumption, and "endorsing the [FCC]'s view that 'necessary' must mean the same thing in the periodic review context as in the rulemaking context," Pet. App. 31a, there is no conflict.[13]

Clear Channel's quotations of fragments from *Cellco* are misleadingly incomplete, as can be seen by reference to the complete passages from which Clear Channel quotes. For example, Clear Channel claims that *Cellco*, "expressly extended to Section 11 the 'presumption in favor of repealing or modifying covered rules' that the D.C. Circuit had found inherent in Section 202(h)." Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 97). What *Cellco* actually said was that "the [FCC] agreed that *where §11's conditions are met*, §11 creates a presumption in favor of repealing or modifying" the

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[12] The provision directly at issue in *Cellco* was §11 of the 1996 Act, a biennial review provision that, just like §202(h), requires the FCC to repeal or modify regulations no longer "necessary in the public interest."

[13] Petitioners rely on the D.C. Circuit's pre-*Cellco* decisions in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox I*"), and *Sinclair v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*"). However, the D.C. Circuit later modified the *Fox I* decision to "leave unresolved precisely what §202(h) means." *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002) ("*Fox II*"). Moreover, *Cellco* explicitly discussed and harmonized its ruling with those in *Fox I*, *Fox II* and *Sinclair*. 357 F.3d at 97-98. The *Cellco* panel pointed out that "shortly after *Sinclair* was decided, the court in [*Fox II*] retracted *Fox I*'s definition of 'necessary'" and that "the court in *Sinclair* did not adopt a general presumption in favor of modification or elimination of regulations." 357 F.3d at 98. Thus, for example, when NAB refers (04-1033 Pet. 22, *see also* 04-1036 Pet. 24, 04-1045 Pet. 19) to *Fox I* and *Sinclair* as imposing "a presumption in favor of repealing or modifying the ownership rules," it ignores the subsequent *Cellco*, ruling, which specifically stated that "neither *Fox I* nor *Sinclair* adopted a controlling definition of 'necessary,' much less the position that §11 embodies a presumption in favor of deregulation." 357 F.3d at 98. Importantly, the *2002 Biennial*, which purports to rely on *Fox I* and *Sinclair*, Pet. App. 215a (*2002 Biennial* ¶11), was issued prior to the *Cellco* decision.

rules. 357 F.3d at 97 (emphasis added). Indeed, there is no dispute within or among the circuits that when a regulation is found no longer to be in the public interest that there is a presumption in favor of repeal or modification. *See id.* at 99. Similarly, although Clear Channel claims that *Cellco* imposes obligations that go "beyond [the FCC's] normal monitoring responsibilities," Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 99), the decision's preceding sentence makes clear that the *Cellco* court was referring to remedies, not the threshold test. 357 F.3d at 99 ("The [FCC] reasonably concluded that the deregulatory presumption arises only after it has determined under §11(a) that a regulation is no longer necessary in the public interest.").

2. NAB, supported by Clear Channel, presents a second statutory argument, claiming that the deregulatory goals of the 1996 Act permit the FCC only to deregulate and precludes it from ever tightening its radio ownership regulations at the conclusion of a biennial review. 04-1033 Pet. 19-26; Clear Channel Br. 20-24. There is no suggestion of a circuit conflict on this point, and no specific statutory provision governs this question. This, then, is also an issue as to which the FCC is entitled to substantial deference. *See, e.g.,. Mead,* 533 U.S. at 229.

NAB argues (04-1033 Pet. 22) that "Sections 202(b) and 202(h) together express a clear directive that local ownership restrictions not be tightened," but none of the language it cites from the statute or the D.C. Circuit's *Fox* and *Sinclair* decisions addresses the particular issue presented here. To say that "Congress set in motion a process to deregulate the structure of the broadcast and cable industries," 04-1033 Pet. 22 (quoting *Fox I*, 280 F.3d at 1033), is not inconsistent with an agency determination that the deregulatory process can be accomplished with one step backward and three steps forward.

Both NAB and Clear Channel likewise maintain that the phrase "repeal or modify" must be read so that "modify" means only "that the [FCC] can relax existing restrictions; it does not authorize the [FCC] to tighten them." 04-1033 Pet. 23; *see also* Clear Channel Br. 20, and that the court of appeals ruling "conflicts with the text and structure of Section 202 as a whole." Clear Channel Br. 21. There is no basis to disturb the court of appeals' holding on this point. As the panel majority reasonably explained, the deregulatory goal of §202(h) is fulfilled by "requir[ing] the [FCC] periodically to justify its existing regulations, an obligation it would not otherwise have." Pet. App. 34a. *See also id.* at 124a ("Despite §202(h)'s admittedly deregulatory tenor, the statute does not foreclose the possibility of increased regulation under the biennial review if the [FCC] finds such action in the public interest.") (Scirica, C.J., concurring in part and dissenting in part). There is nothing important or novel about this garden variety question of statutory construction, or the resolution of it below, much less anything which would rise to the level of significance to merit this Court's attention.

III. ROUTINE APPLICATION OF WELL-SETTLED ADMINISTRATIVE LAW STANDARDS DOES NOT MERIT THIS COURT'S INTERVENTION

1. Both NAA and the Government's Conditional Cross-Petition contend (04-1045 Pet. 23-25; 04-1168 Cross-Pet. 21-28) that the court of appeals did not afford sufficient deference to the FCC's decisionmaking.[14] Yet neither claims that

[14] The deference claim is not raised by other industry Petitioners. Like Public Interest Respondents, many industry Petitioners argued to the court below that certain FCC decisions were arbitrary and capricious. *See* Pet. App. 52a (industry petitioners argued exclusion of cable but inclusion of internet in diversity index arbitrary and capricious); 58a (industry petitioners argued "equal market shares" assumption arbitrary and capricious); 103a (industry petitioners argued specific local radio limits arbitrary and capricious).

the court failed to articulate the correct deference standards. *See* 04-1045 Pet. 24; 04-1168 Cross-Pet. 23, 27. Indeed, the court below correctly noted that its scope of review was narrow, Pet. App. 25a, that it was not to substitute its judgment for that of the agency, *id.*, and that "[d]eference to the [FCC]'s judgment is highest when assessing the rationality of the agency's line-drawing endeavors," *id.* at 62a. The court remanded only when the agency's decision was "not supported by substantial evidence." *Id.* at 25a. Importantly, there was no disagreement between the majority and Chief Judge Scirica about the proper legal standards, *compare id.* at 24a-26a, *with id.* at 116a-118a; the only disagreement was over the application of those standards to specific rules at issue. At bottom, NAA and the Government simply quarrel over this application of law to fact. That issue does not merit review. Sup. Ct. R. 10.

2. Notwithstanding the fact that this issue does not warrant intervention by this Court, the court of appeals' decision to remand certain rules was correct. The Government claims (04-1168 Cross-Pet. 21) that the court of appeals should have deferred to the FCC's decision to assume equal market shares for outlets within the same media. The flaw in this argument, as the court observed, is that this equal market share assumption conflicted with other parts of the *2002 Biennial*, where the FCC expressly found that there was "no reason to believe that all media are of equal importance." Pet. App. 59a (quoting *2002 Biennial* ¶409). The court correctly pointed out that "the assignment of equal market shares generates absurd results," such as the Dutchess Community College television station receiving a market share *equal to* New York City's ABC affiliate and *higher than* the *New York Times*. Pet. App. 59a. In sum, the court found that "assuming equal market shares [is] unrealistic and inconsistent with the [FCC]'s overall approach . . . and proffered rationale," and thus it properly remanded that decision. *Id.* at 61a.

The Government also questions (04-1168 Cross-Pet. 24) the deference given to the FCC's decision to give substantial weight to the internet in the FCC's Diversity Index. Once again, however, the court appropriately remanded in light of the FCC's failure to explain obvious inconsistencies. The court correctly noted that the FCC's rationale for excluding cable television from the Diversity Index also necessarily applied to the internet. *See* Pet. App. 52a-58a. For example, while the FCC discounted cable where a survey suggesting that cable was a source of local news conflicted with other record evidence, the FCC failed to discount the internet under analogous circumstances. *Id.* at 55a.[15] Because the similarities between cable television and the internet required consistent treatment, the court properly found that the "decision to count the Internet as a source of viewpoint diversity, while discounting cable, was irrational." *Id.* at 52a.

Finally, the Government challenges (04-1168 Cross-Pet. 27-28) the court of appeals' review of specific limits chosen regarding cross-media and local radio station ownership. But in fact the court *upheld* many of the FCC's line-drawing decisions, *see id.* at 75a (upholding "top-four restriction" on local TV ownership), 85a (upholding local radio market definition), only remanding those that were marred by inconsistencies. For example, the specific limits created by the FCC, purportedly developed to prevent "problematic levels of concentration," *id.* at 509a (*2002 Biennial* ¶435), would have allowed certain media combinations resulting in considerably higher concentration levels than others that were prohibited. The court correctly held that "[t]he [FCC]'s failure to provide any explanation for this glaring inconsistency is without a

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[15] Further, the court noted that the FCC's attempt to justify the differential treatment by arguing that local cable news is not available to everyone while the internet is was inconsistent with the FCC's recognition (elsewhere in the *2002 Biennial*) that nearly one-third of Americans have no internet access. Pet. App. at 57a-58a.

doubt arbitrary and capricious." *Id.* at 63a. Thus, while the court properly engaged in highly deferential review of specific limits chosen by the FCC, it did not abdicate its responsibility to remand when the lines drawn were not supported by the record and therefore "patently unreasonable." *Sinclair*, 284 F.3d at 162.[16]

It is a truism that this Court is "'[a] court of law . . . rather than a court for correction of errors in fact finding.'" *Missouri v. Jenkins*, 515 U.S. 70, 162 (1995) (Souter, J., dissenting) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949)). As the decision below rests upon a correct understanding of this Court's principles of administrative deference, Petitioners' contention is simply that the court of appeals misapplied the law to the facts of this case. As explained above, that case-specific issue does not merit this Court's attention.

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[16] The Government also challenges (04-1168 Pet. 27-28) the remand of the FCC's specific local radio ownership limits. Once again, the court of appeals remanded these limits because of the irrational and inconsistent manner in which they were developed. For example, the court pointed out that the FCC failed to explain why it ignored the DOJ/FTC Merger Guidelines in developing the local radio limits, but expressly relied on the Guidelines in developing analogous local television ownership limits. Pet. App 103a. Further, while the rationale for the local radio ownership limits depended heavily on the theory that a certain number of equal-sized competitors would make a market competitive, the court correctly noted that "record evidence supports neither actual nor potential existence of equal-sized competitors" in the local radio market. *Id.*

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEWSPAPER ASSOCIATION OF AMERICA, BELO CORP., GANNETT CO., INC., and MORRIS COMMUNICATIONS COMPANY, LLC,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

The joint corporate disclosure statement for the Petitioners was set forth on pages iii and iv of the Petition, and there are no changes to that statement.

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ADMINISTRATIVE MATERIALS

2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R.
13620 (2003) 3, 6, 7

Respondents Federal Communications Commission and United States of America ("FCC") agree with Petitioners that the Third Circuit erred in determining that the Commission had not provided sufficient justification for its cautious and measured relaxation of the limits on media ownership. FCC Opp. 14-15. Nevertheless, the FCC contends that review by this Court of the Third Circuit's derailment of the Congressionally–mandated review and relaxation of long-outdated ownership taboos is not warranted "in the present posture of the case," FCC Opp. 12, and that such review should await completion of open-ended proceedings on remand. The self-styled Public Interest Respondents ("Prometheus") likewise counsel deferral of further review and prefer to maintain, for the indefinite future, antiquated rules, including an absolute ban on newspaper cross-ownership adopted thirty years ago, in a world without 500-channel cable, DBS, or the Internet. Prometheus Opp. 3, 16-17.

It is not surprising that the FCC wishes to avoid further consideration of the implications of the clear-cut deregulatory mandate of Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996), and postpone review by this Court of the unique and extremely limited Constitutional protections that have been accorded broadcasters under *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Review by this Court is necessary, however, to prevent the indefinite perpetuation of archaic and discriminatory restrictions on newspaper/broadcast cross-ownership that disserve the American public and to permit the Commission to complete expeditiously the task expressly assigned to it by Congress under the 1996 Act. Moreover, without proper and definitive guidance on the proper statutory and First Amendment framework, the FCC's proceedings on remand may serve only to perpetuate the agency's and the Third Circuit's errors and result in another decision, after years of delay, that fails to satisfy Constitutional requirements or the specifications of Congress.

I. Review By This Court Is Necessary To Provide Clear And Definitive Guidance On The Correct Statutory And Constitutional Framework For Agency Action And Prevent Unnecessary Delay And Further Error On Remand.

In their Petition, the Newspaper Association of America, Belo Corp., Gannett Co., and Morris Communications Company, LLC (collectively "NAA") demonstrated the need for this Court to review the Third Circuit's decision in order to provide the FCC with clarification regarding the legal boundaries of its periodic review obligations and to ensure that the agency is given the flexibility to carry out its statutory obligation to reconcile its media ownership regulations with the realities of the contemporary marketplace. NAA Pet. 17-18, 23. Both Prometheus and the FCC responded in substantial part that the case is currently in an "interlocutory" posture, and that the Court should not review the matter until agency proceedings on remand from the Third Circuit are completed. *See, e.g.*, Prometheus Opp. 2-3; FCC Opp. 12-13.[1]

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[1] The FCC recites the unremarkable proposition that the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." FCC Opp. 12 (citing *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.)). The general practice, however, is inapposite here. The Third Circuit has reached a decision on the rule and record presented to it by the FCC that frustrates Congress's mandate of a timely review process. Further, the broadcast and newspaper industries as well as the American public are now and will continue to be injured by the Third Circuit's directive to maintain the prior cross-ownership ban. Finally, in the interest of efficient remand proceedings, this Court should clarify the proper First Amendment and statutory standards to be applied by the agency.

Prior Supreme Court practice confirms that there is no impediment to the Court's exercise of jurisdiction when a reviewing court remands a matter to an agency. *See, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 762-63 (2004) (granting certiorari in case involving remand to the Department of Transportation to conduct an environmental impact

(Cont'd)

This is not an ordinary case, however, and does not involve a routine rulemaking undertaken at the behest of petitioners or the agency itself. To the contrary, in the 1996 Act, Congress specifically ordered the FCC to conduct a biennial[2] review of its media ownership rules. The Commission is directed to "determine whether any of [these] rules are necessary in the public interest as the result of competition, [and] . . . repeal or modify any regulation it determines to be no longer in the public interest." § 202(h), 1996 Act.

Based on the Commission's extensive factual record and "reasoned analysis," the Third Circuit agreed with "the Commission's determination that a blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest." *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), at 40a.[3] In reaching its decision, the court pointed to numerous examples from the record on the benefits of cross-ownership, including a study finding "that newspaper-owned television stations provide almost 50% more local news and public affairs programming than other stations." *Id.* at 41a.

(Cont'd)

statement); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 467 (1984) (granting certiorari when the court of appeals "found the [FCC's] record 'patently inadequate' to support the FCC's conclusion"); *Fed. Energy Regulatory Comm'n v. Pennzoil Producing Co.*, 439 U.S. 508, 514 (1979) (granting certiorari in a case involving remand to an agency to conduct further proceedings). Notably, in each of the three cited cases, the *government itself* petitioned the Court for review.

[2] Congress continues to require regular evaluations of existing media ownership rules, now every four years. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004).

[3] The Court of Appeals decision is cited as 1a-190a and is contained in the appendix filed by Media General, Inc. The FCC's 2003 Order, *2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 F.C.C.R. 13620 (2003), is cited as 206a-723a.

While the Court of Appeals agreed with the Commission on the public interest harms generated by the absolute cross-ownership ban, it remanded the new, more lenient cross-media rules, *id.* at 11a-12a, and continued to stay their effectiveness. *Id.* at 107a. By maintaining the stay, the court left in effect the very ban that it previously agreed "was no longer in the public interest." *Id.* at 40a.[4] As NAA showed in its Petition, the delay and uncertainty created by this elongated process threatens the financial health of the newspaper and broadcasting industries and undermines the Congressionally-mandated process of reviewing the rules on a regular basis. NAA Pet. 17-18.

The FCC contends that the "old rules were not challenged in this proceeding" and, thus, are not currently at issue. FCC Opp. 13; *see also* Prometheus Opp. 16. The entire focus of the proceedings below, however, was the review and reevaluation of the continued validity of the FCC's prior ownership rules. The Commission concedes that "[h]ad the Third Circuit upheld the new broadcast ownership rules, this case would have presented the question whether those otherwise-valid rules could survive the stricter constitutional standards petitioners advocate." FCC Opp. 13. By continuing the stay, however, the Court of Appeals has effectively established a cross-ownership rule for the indeterminate future – namely, the longstanding but now-discredited cross-ownership ban. Thus, the Third Circuit's

[4] The Commission has tried unsuccessfully in past cases to raise similar objections to judicial review of changes to its ownership rules. In an earlier biennial review case, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), the Commission had *left in place* the national 35% cap on television station ownership. Although the FCC asserted that "its decision not to repeal or to modify the Rules [was] not final agency action," *id.* at 1037, the court reached the opposite conclusion: "There is no question a Commission determination not to repeal or to modify a rule . . . is a final agency action subject to judicial review." *Id.* The Third Circuit's determination to displace the FCC's revised rules and continue in effect the agency's prior cross-media ownership ban likewise has concrete and immediate application to affected parties and, therefore, is reviewable at this time.

decision and the continuance of the prior ban would appear to satisfy even the Commission's stated standard for review. Further, in its current posture, this case presents clearly the question of the appropriate level of First Amendment scrutiny in reviewing measures like the newspaper/broadcast cross-ownership ban. NAA Pet. 28-29. Plainly, the unsupported and twice-rejected newspaper prohibition could not withstand strict or intermediate scrutiny. *Even if* rational basis review is appropriate, as urged by Respondents, it is patently irrational to allow a rule that the FCC and Third Circuit have already found to be unjustified to continue in effect for the indeterminate future. *See* NAA Pet. 26-28.

II. Further Review Is Necessary To Correct The Third Circuit's Erroneous Interpretation Of Section 202(h) As Well As Its Failure To Adhere To Basic Principles of Administrative Law.

Contrary to the claims of the FCC and Prometheus, FCC Opp. 24-26; Prometheus Opp. 17-20; FCC Cross-Pet. 19-20 & n.10, review of the Third Circuit's decision concerning the proper interpretation of Section 202(h) is both appropriate and necessary *before* any further proceedings on remand. *See* NAA Pet. 19-23; NAB Pet. 22-25; Clear Channel Br. 20-27. This Court's review is urgently required in order to resolve a conflict in the circuits and to avoid further delaying the repeal or modification of the thirty-year-old newspaper/broadcast cross-ownership ban.

To support their contentions, the FCC and Prometheus focus myopically on isolated portions of the D.C. Circuit's and Third Circuit's decisions regarding the governing legal standard under Section 202(h). But one must do no more than read with minimal care the decision below and the D.C. Circuit's decisions interpreting the FCC's biennial review mandate to grasp the seriousness of the claim that the Third Circuit adopted and applied "essentially the same standard" as the D.C. Circuit. FCC Opp. 26; *see* Prometheus Opp. 18-20. Both circuits may have

alluded to the FCC's obligation to "provide an adequate explanation," FCC Opp. 25 (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042, 1044 (D.C. Cir. 2002)); FCC Cross-Pet. 16-17 (same), as required by the Administrative Procedure Act ("APA") in order to justify the retention of a rule. *See* FCC Cross-Pet. 16-17 (citing *Prometheus* at 34a-36a); Prometheus Opp. 19 (citing *Prometheus* at 31a). That, however, is where any real similarity ends. Although the Court of Appeals paid lip service to the "deregulatory" purpose of the 1996 Act, Prometheus Opp. 18 (citing *Prometheus* at 34a, 122a), the reality is that the Third Circuit gave no effect to that purpose whatsoever. NAA Pet. 20-23.

The D.C. Circuit, by contrast, has not only emphasized the deregulatory purpose of Section 202(h), *see Fox*, 280 F.3d at 1033; *see also Cellco Partnership v. FCC*, 357 F.3d 88, 97 (D.C. Cir. 2004), but has actually *given effect to* that purpose by critically scrutinizing the FCC's other biennial review decisions under Section 202(h). In its Section 202(h) cases, the D.C. Circuit has demanded a detailed justification for the FCC's determination that specific rules should be retained intact and has reversed the Commission's decisions to keep in place several of the rules at issue below. *See, e.g.*, *Fox*, 280 F.3d at 1040-45, 1049-52; *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159, 162-65 (D.C. Cir. 2002); *see also* NAA Pet. 4-6, 18; NAB Opp. 3. The Third Circuit, however, required the FCC to provide additional justification only where it had sought to lessen regulatory burdens on media companies, *see Prometheus* at 102a-106a; upheld the FCC's authority to expand regulations in the course of its biennial review, *id.* at 34a; and, by maintaining its stay of the deregulatory portions of the *2003 Order*, *id.* at 107a, required the continued enforcement of the blanket ban on newspaper/broadcast cross-ownership even though both the agency and the Third Circuit itself agreed that the rule is "no longer in the public interest," *id.* at 107a, 40a; *2003 Order* at 453a. In short, regardless of whether the Third Circuit may have *articulated* a standard that can be likened to that adopted by the

D.C. Circuit, the Third Circuit plainly did not *apply* a standard anything like that applied by the D.C. Circuit.

Further, the FCC and Prometheus disregard the Third Circuit's explicit disagreement with its sister circuit on two issues of critical importance. First, the D.C. Circuit's rulings made clear to the FCC that the biennial review mandate, at a minimum, "upend[s] the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *2003 Order* at 215a. The Third Circuit reversed the FCC on this point, finding that the D.C. Circuit's decisions had "misguided" the FCC into believing that Section 202(h) places any burden upon it at all. *Prometheus* at 34a-35a. Second, the D.C. Circuit made clear in *Cellco* that the FCC's biennial review duties "extend[] beyond [the FCC's] normal monitoring responsibilities" under the APA. 357 F.3d at 99; *see* NAA Pet. 22-23; Clear Channel Br. 25-26.[5] The Third Circuit held, instead, that the biennial review adds nothing at all to what the agency must do in the ordinary course to avoid arbitrary and capricious decision-making under the APA. *See Prometheus* at 34a (holding that Section 202(h) was deregulatory only insofar as it "requires the [FCC] periodically to justify its existing regulations"); NAA Pet. 22-23 (explaining that the FCC already has such an obligation under ordinary principles of administrative law).

Finally, even if there were no disagreement between the two circuits regarding the proper interpretation of Section 202(h), that would not justify denial of NAA's petition. To the contrary, this case presents questions of critical national

[5] Prometheus mischaracterizes this portion of the *Cellco* opinion as dealing only with remedies by focusing on the single sentence that preceded the D.C. Circuit's statement. Prometheus Opp. 20. That sentence, however, was part of the summary paragraph explaining the circuit court's entire rationale. *Cellco*, 357 F.3d at 97. Moreover, the inclusion of Section 202(h) within the broader and explicit deregulatory framework of Section 202 contrasts with the separate provision at issue in *Cellco*.

importance involving the structure of our nation's media marketplace and the standard under which the FCC may review its rules governing that structure, and warrants review for these reasons alone. NAA Pet. 17-18.[6]

Indeed, contrary to the FCC's suggestion, this case presents far more than "the factbound question whether the Commission adequately provided sufficient justifications for its new rules." FCC Opp. 15; *cf.* Prometheus Opp. 3. The adequacy of the FCC's justifications for its proposed regulations cannot be assessed properly without taking into account the peculiar characteristics of the Congressionally-mandated review process as well as the governing First Amendment standards for agency action in this area. In that light, it is abundantly clear that the Court of Appeals erred in setting aside the FCC's deregulatory initiatives.[7]

As NAA demonstrated in its Petition, the Third Circuit erred in both its interpretation of the governing legal standard under Section 202(h) and its application of that standard to the FCC's limited attempt to temper the outdated newspaper/broadcast cross-ownership ban. NAA Pet. 19-23. By interpreting the statute in a manner that stripped the biennial review mandate of any

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[6] This Court on numerous occasions has granted certiorari to review FCC orders relating to media ownership rules and provisions of the 1996 Act, even in the absence of a circuit split. *See* NAB Pet. 16-17 (citing authorities); Clear Channel Br. 13-15 (same).

[7] As NAA demonstrated, and as the FCC as well as Chief Judge Scirica in his dissent agreed, the Court of Appeals majority plainly erred in substituting its judgment for the expert agency's determination to provide limited and necessary relief from the cross-ownership ban. NAA Pet. 23-25; FCC Cross-Pet. 21-28; *Prometheus* at 125a-26a (Scirica, C.J., dissenting). Prometheus's endorsement of the Third Circuit's approach, Prometheus Opp. 22-23, suffers from the same failure to appreciate the inherently subjective nature of any diversity analysis and the need for reasonable flexibility in agency line-drawing exercises. *See* NAA Pet. 23-25.

meaning at all, the panel below ignored the Act's language, structure, context, and legislative history. *Id.* Section 202(h) does not stand alone, but was part of Congress's broader and decidedly deregulatory program for media ownership in the 1996 Act. *See id.* 19-20; NAB Pet. 16, 22-25; Clear Channel Br. 21-22.

This Court has long held that statutes must be read "to give effect, if possible, to every clause and word" and to avoid "emasculat[ing] an entire section." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (internal quotations marks and citation omitted). The conflation of the specific biennial review standard with the general APA standard that governs *all* agency determinations – which the FCC and Prometheus urge this Court to effectively sanction by allowing the decision to stand – also violates the canon of construction that a "specific" statutory enactment "governs [a] general" one. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 348 (1998) (internal quotation marks and citation omitted).

* * *

In short, the Third Circuit's decision to remand the new cross-media limits and require continued compliance with the discredited absolute ban on newspaper/broadcast cross-ownership necessitates review by this Court. Under the panel's own decision, *Prometheus* at 33a-34a, the precedents of the D.C. Circuit, any reasonable reading of Section 202(h), and settled principles of administrative law,[8] a rule that has been found to be unjustified by both the relevant agency and the reviewing court cannot be retained. *Cf.* FCC Opp. 26; Prometheus Opp. 20. Absent this Court's review and correction, the Third Circuit's legal errors will necessarily taint the FCC's proceedings on

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[8] *See* NAA Pet. 22 ("[T]he FCC cannot rest on a rule if 'time and changing circumstances reveal that the public interest is not served by [its] application.'") (quoting *NBC v. United States*, 319 U.S. 190, 225 (1943) (internal quotation marks omitted)); *see also id.* (citing additional authorities).

remand. *See* NAA Pet. 17; Clear Channel Br. 15. Moreover, absent further review, the lower court's retention of jurisdiction over this case will leave that court as the sole arbiter of controversies surrounding the FCC's biennial review of the rules governing the nation's media marketplace and inevitably frustrate the agency's effort to achieve the deregulatory result intended by Congress.

CONCLUSION

For the forgoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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